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IN THE

United States Supreme Court

JASON B. NICHOLAS, JOHN LEWIS, PHILIP RABENBAUER, FRANK SOLIMINE, ROBERT PACINI, CHESTER FLANDERS, BENNIE BATES, LYMOND STEPHENSON, LUIS MEJIA, CECIL BARROW, and DOMINIC DERUGGIERO,

Petitioners,

v.

GLENN GOORD, New York State Department of Correctional Services; KATHERINE LAPP, New York State Division of Criminal Justice Services; MEDILABS, INC.; and JESSICA WALSH,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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July 24, 2006

QUESTION PRESENTED

Does a State violate the Fourth Amendment when it forcibly collects and analyzes blood and DNA from individuals without a warrant or any individualized suspicion of criminal wrongdoing, where such collection and analysis is solely for the purpose of creating a DNA database for use in solving crimes?

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PETITION FOR WRIT OF CERTIORARI

Jason B. Nicholas, Philip Rabenbauer, Frank Solimine, Robert Pacini, Chester Flanders, Bennie Bates, Lymond Stephenson, Dominic DeRuggiero, Luis Mejia, Cecil Barrow, and John Lewis respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 28, 2005, panel rehearing and rehearing en banc denied April 26, 2006.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit is reported at 430 F.3d 652 (2d. Cir. 2005). *See also* App. 1a-48a.[1] The district court's opinion is reported at No. 01 Civ. 7891, 2004 WL 1432533 (S.D.N.Y. June 24, 2004). *See also* App. 50a-61a.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Second Circuit were entered on November 28, 2005. Petitioners timely moved for panel rehearing and rehearing *en banc*. Both motions were denied on April 26, 2006. *See* App. 49a. This petition is timely submitted pursuant to this Court's Rule 13.3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment IV reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

[1] References to the Appendices to this Petition are styled "App. __a."

Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The New York State DNA Identification Index Law, N.Y. Exec. Law § 995-c(Consol. 1999), reads in relevant part:

* * *

(3) Any designated offender subsequent to conviction and sentencing for a felony specified in subdivision seven of section nine hundred ninety-five of this article shall be required to provide a sample appropriate for DNA testing to determine identification characteristics specific to such person and to be included in a state DNA identification index pursuant to this article.

* * *

(5) The sample shall be collected, stored and forwarded to any forensic DNA laboratory which has been authorized by the commission to perform forensic DNA testing and analysis for inclusion in the state DNA identification index. . . . Such laboratory shall perform DNA analysis only for those markers having value for law enforcement identification purposes. . . .

(6) DNA records contained in the state DNA identification index shall be released only for the following purposes:

(a) to a federal law enforcement agency, or to a state or local law enforcement agency or district attorney's office for law enforcement identification purposes upon submission of a DNA record in connection with the investigation of the commission of

> one or more crimes or to assist in the recovery or identification of specified human remains, including identification of missing persons, provided that there exists between the division and such agency a written agreement governing the use and dissemination of such DNA records in accordance with the provisions of this article; . . . .

STATEMENT OF THE CASE

In 1994, New York created a Commission on Forensic Science ("Commission") and authorized the Commission to create a computerized collection of DNA profiles ("DNA databank"). N.Y. Exec. Law § 995-a (Consol. 1999). The data for the DNA databank are collected from individuals convicted of a designated set of offenses. *Id.* § 995-c(3). Petitioners are current and former prisoners who are subject to the DNA databank statute's requirements.

On August 23, 2001, petitioners filed a pro se complaint, maintaining that the suspicionless and warrantless extraction of blood, and subsequent analysis and retention of bodily fluids by appellees pursuant to the DNA databank statute, violates the Four... Amendment.[2] The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3).

Petitioners, some of whom have been released from prison, are among the least likely of all offenders covered by the DNA databank to commit new crimes. (Joint Appendix on Appeal ("JA") 32, JA77.) Respondents collected petitioner's DNA by drawing blood. The blood draws have at no time been carried out pursuant to a warrant or based on individualized suspicion. The nonconsensual suspicionless extraction of blood samples for the DNA databank is an ongoing practice that is accomplished through threat of "physical force and other punishments, including solitary confinement and loss

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[2] The DNA databank law has been amended subsequent to the institution of Petitioner's lawsuit. None of the amendments is material to Petitioners' challenge to the constitutionality of the databank.

of good-time credits." (Compl. ¶ 10.) The blood is analyzed "only for those markers having value for *law enforcement identification purposes*." N.Y. Exec. Law § 995-c(5) (emphasis added).

Respondents moved to dismiss petitioners' complaint pursuant to Fed. R. Civ. P. 12(b)(6), arguing that the suspicionless and warrantless extraction of petitioners' blood did not violate the Fourth Amendment. The central dispute between the parties below was whether the DNA databank could be upheld under the "special needs" exception to the Fourth Amendment's general presumption in favor of a warrant and individualized suspicion. *See New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment) (introducing "special needs" framework). As this Court has clarified the "special needs" test, suspicionless and warrantless searches are generally only permitted when the purpose of the search is divorced from law enforcement needs. *See Ferguson v. City of Charleston*, 532 U.S. 67, 83–84 (2001). The district court dismissed petitioners' complaint pursuant to Fed. R. Civ. P. 12(b)(6), applying the Fourth Amendment's general balancing test instead of the "special needs" test. *See* App. 55a-59a. The district court recognized that the DNA databank was unlikely to pass muster under the "special needs" test, precisely because the databank's purpose was inextricably linked to law enforcement needs. *Id.* 57a-58a.

Petitioners filed a timely appeal. The Court of Appeals for the Second Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. In a decision announced on November 28, 2005, the Second Circuit upheld the decision, but not the district court's reasoning.[3] The Second Circuit agreed with petitioners that the district court had erred by applying a general Fourth Amendment balancing test to the DNA databank statute without first asking whether the collection of DNA meets the "special needs" test. *See* App. 18a-24a. The Second Circuit, however, found that such a special need existed because the databank's primary purpose is to "create a DNA database to assist in solving crimes should the investigation of such crimes resort to DNA

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[3]Although each judge on the panel joined Chief Judge Walker's majority opinion, Judge Leval and Judge Lynch each wrote separately to explain the basis for their decision. *See* App. 32a-42a (Leval, J., concurring); 42a-48a (Lynch, D.J., concurring).

testing of evidence." *Id.* 25a (internal quotation marks omitted). The appellate court reasoned that such a purpose was a special need because the DNA samples "provide no evidence in and of themselves of criminal wrongdoing, and are not sought for the investigation of a specific crime." *Id.* 26a (internal quotation marks omitted). The Second Circuit then concluded, balancing the government's interest in maintaining the DNA databank against the intrusion on appellants' privacy, that the challenged searches and seizures were reasonable.

Petitioners requested panel rehearing and rehearing *en banc* of the Second Circuit's decision. On April 26, 2006, the Second Circuit denied both motions. *Id.* 60a.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT'S DECISION CONFLICTS WITH CONTROLLING SUPREME COURT PRECEDENT

The Fourth Amendment secures "[t]he right of the people . . . in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV, XIV. This Court has held that "[t]o provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible." *Chimel v. California*, 395 U.S. 752, 758-759 (1969) (internal quotation marks omitted). Particularly relevant to this case, this Court has held that a search or seizure is presumptively unreasonable when it is not supported by individualized suspicion. *E.g.*, *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) ("A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing."); *Katz v. United States*, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment."). Consequently, because the searches and seizures of petitioners' blood and DNA were carried out absent individualized suspicion or a warrant, basic Fourth Amendment principles require the State to show that it is

entitled to invoke one of the limited exceptions to the usual requirements of the Fourth Amendment. *See, e.g., Vernonia School Dist. v. Acton*, 515 U.S. 646 (1995) (upholding random drug-testing of student athletes); *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (finding sobriety checkpoint constitutional); *New York v. Burger*, 482 U.S. 691 (1987) (permitting administrative search of closely regulated business).

One exception to the Fourth Amendment's general requirement of a warrant and individualized suspicion is where "special needs, *beyond the normal need for law enforcement*, make the warrant and probable-cause requirement impracticable." *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in judgment) (emphasis added). To satisfy the "special needs" exception, the Government must meet a two step test: first, it must articulate a need for the search or seizure that is not directed toward vindicating law enforcement needs; and second, it must show that requiring conformity to the Fourth Amendment's strict warrant and probable cause requirement would be impracticable, given the balance between the special need asserted by the state and the privacy interests asserted by the subject of the search or seizure.

The principle behind the "special needs" exception is straightforward and consistent with other exceptions to the Fourth Amendment's requirements. Where the State seeks to obtain information that would under normal circumstances require application to a judicial officer for a warrant issued on probable cause, then the State must show that there is a good reason that justifies suspension of the warrant and probable cause requirements. *E.g., Chandler v. Miller*, 520 U.S. 305, 318–19 (1997) (the key question for evaluating a "special need" is whether the government can point to any "concrete danger demanding departure from the Fourth Amendment's main rule"); *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) ("[A] warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation.'" (quoting *Terry v. Ohio*, 392 U.S. 1, 25–26 (1968))); *Chimel v. California, supra* (search of arrested suspect and area within his control for weapons or evidence); *Warden v. Hayden*, 387 U.S. 294, 298-300 (1967) ("hot pursuit" of fleeting suspect); *Schmerber v. California*, 384 U.S. 757, 770- 771 (1996) (imminent destruction of evidence). The Second

Circuit's decision, however, conflicts with both the letter and spirit of the "special needs" test, as it has been articulated and applied by this Court.

A. The Court of Appeals' Decision Conflicts with this Court's "Special Needs" Precedent

The "special needs" test originated with Justice Blackmun's suggestion that certain warrantless and suspicionless searches may be "reasonable" under the Fourth Amendment, where they vindicate a "special need[], beyond the normal need for law enforcement" that makes the warrant and probable cause requirements "impracticable." *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in judgment). Since *T.L.O.*, this Court has clarified that an absolute requisite of the "special needs" exception is that "the 'special need' . . . advanced as a justification for the absence of a warrant or individualized suspicion [be] one divorced from the State's general interest in law enforcement." *Ferguson*, 532 U.S. at 79.

The Second Circuit held that searches pursuant to the DNA databank law fall under the "special needs" exception to the Fourth Amendment protection against warrantless and suspicionless searches, despite the law's fundamental purpose of generating evidence for use in criminal prosecution. This reasoning directly conflicts with this Court's most analogous "special needs" holding: *Ferguson v. City of Charleston*, *supra*. In *Ferguson*, this Court considered a challenge to a search regime under which pregnant women were subjected to drug testing at a local hospital, in which the results of the testing were used in subsequent criminal prosecutions. The Court found that the suspicionless drug testing program could not be squared with the Fourth Amendment because of the intimate involvement of the police and law enforcement in designing the program and in effectuating arrests under the program. *Id.* at 82–83. In so doing, the Court clarified that under the "special needs" test, even benign motives cannot save the constitutionality of a program which contemplates "the pervasive involvement of law enforcement with the development and application" of the program, such as is present in the instant case. *Id.* at 85; *see also id.* at 88

("The traditional warrant and probable-cause requirements are waived in our previous cases on the explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purposes.") (Kennedy, J., concurring in the judgment).

Nonetheless, here the Second Circuit's decision expressly contemplates that evidence collected through the DNA databank regime will be used primarily, if not solely, for the purpose of solving crime. *See* App. 25a-26a. This contravenes this Court's holding in *Ferguson* that suspicionless searches will fail the special needs test where "the immediate objective of the searches [is] to generate evidence for law enforcement purposes." 532 U.S. at 83–84. The DNA databank statute is nothing other than a codification of the State's attempt to collect evidence to be used to investigate and prosecute "ordinary criminal wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32, 41 (2000). This is not a legitimate purpose under the "special needs" analysis, and never has been. *Ferguson*, 532 U.S. at 83 n.20 ("In none of [the Supreme Court's] previous special needs cases ha[s] [the Court] upheld the collection of evidence for criminal law enforcement purposes.").

The Second Circuit attempted to distinguish *Ferguson*, and other "special needs" cases which confirm *Ferguson*'s general approach, by stating that it is "crucial" that the DNA databank is not directed toward investigating a specific crime or to seeking evidence that the individual being searched has engaged in specific criminal conduct. *See* App. 26a. But the Second Circuit's distinction itself conflicts with basic principles of the Fourth Amendment and controlling Supreme Court authority. The relevant cases simply do not support the Second Circuit's conclusion that a special need is present wherever the government searches for evidence related to unknown or unspecified crimes. Indeed, in *Ferguson*, the government did not have any individualized suspicion that the plaintiffs had engaged in any "specific crime," and this was precisely why the Court applied the "special needs" test and ultimately declared the program unconstitutional. 532 U.S. at 82 (referring to "range of possible criminal charges" that could be brought against plaintiffs). Indeed, the Second Circuit's approach suggests that a lack of individualized suspicion itself would aid in satisfying the "special needs" test because, where law enforcement is collecting

evidence without reference to a particular crime, it is by definition engaged in a suspicionless search. But the "special needs" test would be meaningless if – as the Second Circuit suggests – the lack of suspicion both triggered the requirement of a "special need," and at the same time satisfied the requirement.

Confirming this fundamental Fourth Amendment principle, in *City of Indianapolis v. Edmond*, *supra*, in which the Court reviewed a drug interdiction checkpoint for motor vehicles, the program's broad undifferentiated approach to criminal law enforcement made it less permissible, not more so. 531 U.S. at 43 (contrasting the "smaller class of offenses" targeted by *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990), with the broader set of crimes targeted by Indianapolis's drug interdiction checkpoint); *id.* at 44 (refusing to "sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime") (emphasis added).[4] The DNA databank's broad purpose to collect evidence for use in the prosecution of any crime, without any individualized suspicion, does not detract from the obvious conclusion that its primary purpose is to collect evidence for use in criminal prosecution of the sampled population. Instead, this broad purpose only confirms the unconstitutionality of the databank. Certiorari should be granted to resolve the clear conflict between the Second Circuit's decision below and this Court's holding in *Ferguson*.

B. The Second Circuit's Decision Clashes with this Court's Reasoning in *Illinois v. Lidster*

The Second Circuit recognized that the language and

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[4] The only Fourth Amendment intrusion at issue in *Edmond* was a checkpoint stop and the only fact revealed by the stops at issue in *Edmond* was identification of the individuals driving on the highway. As in this case, this fact does not relate to any specific crime, nor does it provide evidence that in and of itself establishes criminal wrongdoing. Moreover, although *Edmond* involved arrests for crimes both related and unrelated to drugs, 521 U.S. at 34, the Supreme Court did not suggest that the checkpoints were only unconstitutional as to those drivers who were arrested for drug offenses.

reasoning of *Ferguson* and *Edmond* raise serious doubts about the constitutionality of the DNA databank. *See* App. 33a (Leval, J., concurring). However, the appellate court concluded that the Supreme Court's decision in *Illinois v. Lidster*, 540 U.S. 419 (2004), supports the conclusion that a "special need" is present where a search gathers evidence for future criminal prosecution of unspecified crimes. *See* App. at16a-17a; 26a; 33a-36a. As an initial matter, the reliance on *Lidster* to support a novel interpretation of the "special needs" doctrine is curious, because *Lidster* was a checkpoint seizure case, and not a "special needs" search case. This Court has emphasized that a balancing analysis, rather than a "special needs" analysis, applies to vehicle checkpoint cases like *Lidster*. *Ferguson*, 534 U.S. at 83 n.21.

Even assuming that *Lidster* applies to the suspicionless searches challenged here, however, *Lidster*'s reasoning contradicts the Second Circuit's conclusion. In *Lidster*, this Court upheld the constitutionality of a highway checkpoint in which police stopped motorists to ask for information about a recent hit-and-run accident. The *Lidster* Court based its holding on several reasons that are pertinent to this case and which are ignored by the Second Circuit's decision. First, this Court noted that the police in *Lidster* had a primary purpose "to help them apprehend, not the vehicle's occupants, but other individuals." 540 U.S. at 423. This is in direct contrast to the DNA databank at issue here, and the searches and seizures struck down in *Ferguson* and *Edmond*, in which the purpose of the government intrusion is to collect evidence to be used against the individuals being searched and seized.

The *Lidster* Court also distinguished the seizures at issue in *Edmond* because "the context here (seeking information from the public) is one in which, by definition, the concept of individualized suspicion has little role to play." 540 U.S. at 424–25. Collecting blood for the purpose of criminal prosecution, on the other hand, is a context in which individualized suspicion has traditionally played a large role. Indeed, as an ordinary matter, if the State were investigating a particular crime, a warrant and probable cause would be necessary to draw appellants' blood. *Matter of Abe A.*, 437 N.E.2d 265, 266 (N.Y. 1982). By contrast, as the *Lidster* Court pointed out, police are generally free to seek the voluntary

cooperation of citizens in investigating crime. 540 U.S. at 426. The *Lidster* decision simply prevented the anomalous result whereby police would be permitted "to seek the voluntary cooperation of pedestrians" but not "to seek similar voluntary cooperation from motorists." *Id.* Here, instead of preventing an anomalous legal result, the Second Circuit has created one: that is, that ordinarily individuals cannot be required to provide a blood sample for investigation of a crime absent individualized suspicion, but that, where the State seeks to compel a broad category of individuals to provide blood, it may be done provided that the evidence will be used in prosecuting any number of unspecified crimes.

Finally, *Lidster* distinguished *Edmond* in a way that is fatal to the prime justification offered by the Second Circuit in support of its decision, by contrasting the stop's permissible objective "to help find the perpetrator of a specific and known crime" with the impermissible stops at issue in *Edmond*, which were designed to assist in the investigation of "unknown crimes of a general sort." 540 U.S. at 427. Thus, *Lidster* sharply contradicts the Second Circuit's assertion that, because the DNA databank is not aimed at investigating a specific crime, it is permissible under the Fourth Amendment. The DNA databank is much more analogous, if not indistinguishable, from the impermissible searches and seizures at issue in *Edmond* and *Ferguson*.

C. The Court of Appeals Misconstrued the Purpose of the "Special Needs" Exception

As a general matter, this Court has ruled that, so long as a search or seizure complies with the Fourth Amendment's requirements, there is no role for consideration of the subjective intent of the police officer. *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001). The "special needs" test is an exception to this general rule that courts are not to examine whether the justification offered in support of a search is pretextual. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 621 n.5 (1989). Thus, when the Court spoke in *Ferguson* of conducting a "close review" of the justifications for the challenged searches, it was to ensure that the government did not mask its law-enforcement purpose by adverting

to the other socially beneficial goals of the challenged search regime. 532 U.S. at 81.

The Second Circuit takes this distinction between ultimate and primary purpose, however, and turns it on its head. The Second Circuit acknowledges that the ultimate purpose of the DNA databank, like the primary purpose of the regimes challenged in *Edmond* and *Ferguson*, is to "help law enforcement identify the perpetrator of a crime." *See* App. 27a. But the Second Circuit finds that the databank should nonetheless be excused from the general prohibition on suspicionless searches for the purpose of law enforcement, because its "primary purpose" is only the identification of a particular class of offenders. *Id.* This is a perverse interpretation of *Ferguson* because, unlike in *Ferguson*, here the State has not articulated an ultimate purpose unrelated to law enforcement in support of the DNA databank. Therefore, there is no need to inquire whether this ultimate purpose is simply a pretext for a different, primary purpose that is ultimately indistinguishable from law enforcement goals. Here, there can be no question that solving and prosecuting crime is the driving force behind the DNA databank. Characterizing the "primary purpose" of the databank as being different because it relates to identification creates an artificial distinction between the ultimate goal of the databank and the means by which the databank accomplishes that goal.

D. The Petition Should Be Granted to Correct the Appellate Court's Erroneous Balancing Analysis

The writ of certiorari is also appropriate because the Second Circuit's balancing analysis contravenes controlling Supreme Court authority. First, the Second Circuit assumed, incorrectly, that appellants suffered a minimal intrusion because prisoners "are routinely subject to medical procedures, including blood draws." *See* App. 28a. This assumption contradicts the record evidence showing that prisoners cannot be compelled to submit to medical examinations and blood tests against their will (JA22, JA46), and longstanding authority supporting a prisoner's right to refuse medical care. *Harrison v. Barkley*, 219 F.3d 132, 140 (2d Cir. 2000); *Williams v. Greifinger*, 97 F.3d 699, 701 (2d Cir. 1996).

Second, the Court of Appeals incorrectly assumed that the DNA databank accomplishes a minimal intrusion because the DNA samples were only analyzed for so-called "junk DNA," and not other more private information. *See* App. 29a. By focusing on the actual use to which the sample is put rather than the potential use of the sample, the Second Circuit ignored contrary Supreme Court authority which measures the intrusiveness of the search by the potential amount of information revealed, not by the actual information revealed. *E.g., Skinner*, 489 U.S. at 617 (breath test and urinalysis intrude upon legitimate expectation of privacy because the material collected "can reveal a host of private medical facts about an employee," even though sample was only tested for presence of drugs).

Finally, after incorrectly balancing the interests at issue in this case, the Second Circuit misapplied controlling Supreme Court authority which requires that the government demonstrate that the warrant and probable cause requirements are "impracticable." *See, e.g., Vernonia School Dist. 47J v. Acton*, 515 U.S. at 663–64 (1995). This Court has excused the absence of a warrant in past "special needs" cases largely because of the burden imposed by the delay necessary to obtain a warrant. *See Skinner*, 489 U.S. at 631 (burden of obtaining warrant would frustrate government purpose behind the search, because of potential elimination of drugs from bloodstream); *Griffin v. Wisconsin*, 483 U.S. 868, 876 (1987) (finding warrant impracticable because it would interfere with probation system and would cause undue delay); *New York v. Burger*, 482 U.S. 691, 710–11 (1987) (requiring warrant would diminish element of surprise which was important to government's legitimate interests); *O'Connor v. Ortega*, 480 U.S. 709, 720 (1987) (plurality op.) (exception to warrant requirement permitted where obtaining burden will "frustrate the governmental purpose behind the search"); *T.L.O.*, 469 U.S. at 340 (obtaining warrant would "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools"). And this Court has excused the absence of individualized suspicion for other reasons which are not implicated here. *Board of Educ. of Indep. Sch. 3 Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 837 (2002) (requiring individualized suspicion would place "additional burden on public school teachers"

and might "unfairly target members of unpopular groups"); *Acton*, 515 U.S. at 663-64 (referring to shame of being selected for drug testing, impracticability of obtaining parental consent, and additional tasks for teachers for which they are "ill prepared"); *Skinner*, 489 U.S. at 631 (requirement of individualized suspicion is "unrealistic, and inimical to the Government's goal of ensuring safety in rail transportation"); *Griffin*, 483 U.S. at 878–79 (probable cause requirement is incompatible with ongoing supervisory relationship and because probation agency "must be able to act based upon a lesser degree of certainty than the Fourth Amendment would otherwise require in order to intervene before a probationer does damage to himself or society"); *O'Connor*, 480 U.S. at 723–25 (probable cause standard inappropriate in work context because it is "rooted . . . in the criminal investigatory context," because employer has different interest than law enforcement, and because of delay inherent to only being able to act on probable cause); *T.L.O.*, 469 U.S. at 343 (probable cause impracticable because Court wanted to "spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense").

As the relevant cases demonstrate, context is critical in assessing the "impracticability" of the warrant and probable cause requirement. The Second Circuit ignored this context-driven inquiry, finding instead that the Fourth Amendment's presumptive requirements were impracticable with the following tautological reasoning: "Obtaining a warrant requires probable cause, . . . which obviously does not exist in the context of suspicionless searches; requiring a warrant from law enforcement would thus plainly be 'impracticable.'" *See* App. 31a. This is a toothless version of the impracticability test, and if accepted would make the test meaningless when reviewing suspicionless searches. The Second Circuit's reasoning ignores the lesson from relevant cases that context is critical in assessing the "impracticability" of both the warrant and probable cause requirements. Here, where appellants were confined in prison when their blood was extracted, none of the reasons that have been relied upon by the Supreme Court in the past (delay, or interference with a custodial relationship) apply. *E.g.*,

Acton, 515 U.S. at 663-64; *Skinner*, 489 U.S. at 631; *Griffin*, 483 U.S. at 878–79.[5] The Second Circuit's decision does not articulate how the DNA databank fits within this longstanding requirement, other than to state, essentially, that the Constitution does not require individualized suspicion in this case because a requirement of individualized suspicion would defeat the DNA databank's purpose. But this explanation assumes the constitutionality of the challenged database, and leads to an evisceration of the warrant and probable cause requirements. If States may dispense with the Fourth Amendment's presumptive requirements simply by pleading an inability to satisfy them, the constitutional protections of a warrant and probable cause would be rendered meaningless. *Mincey v. Arizona*, 437 U.S. 385, 393–94 (1978) ("The investigation of crime would always be simplified if warrants were unnecessary."); *Payton v. New York*, 445 U.S. 573, 602 (1980) (policy arguments in favor of permitting warrantless felony arrest made in the home "must give way to a constitutional command that we consider to be unequivocal"). Because the Second Circuit's balancing test conflicts with controlling decision of this Court, certiorari should be granted.

II. THE SECOND CIRCUIT'S DECISION BROADLY UNDERMINES THE PRIVACY RIGHTS OF ALL CITIZENS

The Second Circuit's analysis implies that the Fourth Amendment has less force when the State is farther removed from investigating specific crimes and is collecting evidence tangentially related to guilt rather than direct evidence of criminal wrongdoing. This approach ignores the significant history of the Fourth Amendment, adopted in response to British abuse of the general warrant, which permitted customs officials to enter any home to

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[5] The Second Circuit points to *Lidster* and *Earls* as examples of "special needs" cases where the Court did not make an explicit finding of impracticability. *See* App. 31a. Putting aside the fact that *Lidster* is not a "special needs" case, however, the Court did specifically find that individualized suspicion does not fit within the context of "an information-seeking stop." 540 U.S. at 425. And while the decision in *Earls* does not specifically refer to the "impracticability" test, the *Earls* Court relies on *Acton*'s impracticability holding for the proposition that individualized suspicion is inappropriate in the school drug testing context. 536 U.S. at 837.

search without particularized suspicion. *Henry v. United States*, 361 U.S. 98, 100–02 (1959); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 267 (1990) ("driving force" behind the Amendment was hostility to general search warrants). General warrants were issued not based on suspicion that a particular individual had violated a particular crime, but on the possibility that authorities might uncover evidence linking the searched individual to any of a number of possible crimes. The Second Circuit's assumption that the Fourth Amendment imposes fewer restrictions on State privacy intrusions where such general searches occur, unmotivated by individual suspicion as to certain individuals or certain crimes, cannot be squared with the longstanding Supreme Court authority regarding the history and purpose of the Fourth Amendment. As the Supreme Court has declared, "[i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967). [6]

This aspect of the Second Circuit's decision is unfortunately subject to much broader application. The central reasoning of the appellate court – that a search regime passes the "special needs" test where it carries out blanket DNA sampling, not directed at any particular crime – will ensure that broader sampling regimes are upheld as constitutional. The logic of the Second Circuit's opinion supports expansion of the DNA databank to arrestees, regardless of whether the arrest results in a conviction. And there is no logical distinction, given the Second Circuit's reasoning, between the DNA databank challenged in this case and a DNA databank directed at all citizens. Like the DNA databank in this case, a databank directed at all citizens will be used to identify individuals in the event that such identificatory information can be used in a criminal prosecution. And like the DNA databank in this case, the government's interest in

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[6] Similarly, the Second Circuit's suggestion that the Fourth Amendment has less force when the evidence relates to identification rather than direct evidence of "criminal wrongdoing," App. at 26a-27a, is in direct conflict with longstanding Supreme Court authority. The Supreme Court has often found a search to violate the Fourth Amendment despite the fact that the evidence uncovered by the search did not necessarily establish that a crime had been committed. *E.g.*, *Kyllo v. United States*, 533 U.S. 27 (2001); *Flippo v. West Virginia*, 528 U.S. 11 (1999).

maintaining a comprehensive DNA databank will trump the public's interest in remaining free of what the Second Circuit viewed as the minimal intrusiveness of the blood draws challenged here. Given the recurring nature of this important problem, certiorari is appropriate so that the Court can more fully consider the ramifications of the Second Circuit's broad decision.

III. THERE IS A SPLIT WITHIN CIRCUITS REGARDING HOW TO ANALYZE DNA DATABANK LAWS

The constitutionality of DNA databanks for individuals convicted of specified crimes has been actively litigated within the Courts of Appeals. While every appellate court to date has held that such databanks are constitutional, there is a serious split between the circuits as to how to analyze the issue. The Second, Seventh, and Tenth Circuits have correctly chosen to apply the "special needs" analysis to the suspicionless prison searches and seizures similar to those challenged herein. *See* App. 24a; *Green v. Berge*, 354 F.3d 675, 677-78 (7th Cir. 2004); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir.), *cert. denied* 540 U.S. 1083 (2003). Also, at rehearing *en banc*, a majority of the judges in the Ninth Circuit applied the "special needs" analysis in evaluating a DNA databank statute. *See United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004), *cert. denied*, 544 U.S. 924 (2005) (Gould, J., concurring and Reinhardt, J., dissenting).

An alternate test that has been used by six appellate courts is a general balancing test pursuant to this Court's decision in *United States v. Knights*, 534 U.S. 112 (2001). *See United States v. Kraklio*, No. 06-1369, __ F.3d __, 2006 WL 1736389 (8th Cir. June 27, 2006); *Johnson v. Quander*, 440 F.3d 489, 496 (D.C. Cir. 2006), *petition for certiorari filed*; *United States v. Sczubleck*, 402 F.3d 175, 184 (3d. Cir. 2005), *cert. denied*,126 S. Ct. 2930 (2006); *Padgett v. Donald*, 401 F.3d 1273, 1280 (11th Cir.), *cert. denied sub. nom* 126 S. Ct. 352 (2005); *Kincade*, 379 F.3d 813, 832 (9th Cir. 2004) (plurality op.); *Groceman v. United States Dept. of Justice*, 354 F.3d 411, 413 (5th Cir. 2004). The Sixth Circuit has upheld a DNA databank under both analytical frameworks, *see United States v. Conley*, No. 05-5900, __ F.3d __, 2006 WL 1867092, *4–6 (6th Cir. July 7, 2006), and the

Fourth Circuit, pre-*Ferguson*, has applied a balancing test to uphold a DNA databank, *see Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992), *cert. denied* 506 U.S. 977 (1992).

There is thus a clear split of authority between almost every Circuit regarding the proper analysis to use in evaluating the constitutionality of DNA databanks. The split in analyses is an important issue to resolve—in spite of the lack of conflict in the decisions—because, as the Second Circuit recognized below: "the test applied continues to matter, especially since the reasons for adopting a particular test will inevitably have consequences in other search contexts." *See* App. 24a. Furthermore, a correct application of the special needs test should result in the DNA databank statutes being struck down because the suspicionless searches can only be seen as serving a "law enforcement need." *See* Part I supra.[7]

This Court recently held that suspicionless searches of a parolee do not violate the Fourth Amendment, applying the "totality of the circumstances" balancing test. *See Samson v. California*, 126 S. Ct. 2193 (2006). The Court's decision in *Samson* is not dispositive of whether the "special needs" test applies here, however, because a blood and DNA search—requiring forced bodily intrusion for biological matter that will be held and analyzed indefinitely—is quite different from the external and temporally limited searches at issue in *Samson*. In order to comport with the Fourth Amendment's guiding principle of reasonableness, the only test used to evaluate the constitutionality of a statute that allows for forced bodily intrusion to obtain inherently private biological matter that can be searched *ad infinitum* is the more stringent special needs analysis. *Ferguson*, 532 U.S. at 83 n.21 (stating that "special needs" test is proper framework for evaluating suspicionless searches involving bodily intrusion).

Moreover, *Samson* is consistent with this Court's

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[7]For instance, the District Court of Massachusetts has approved a probationer's request for a preliminary injunction against DNA extraction because "the lack of any *special need* for the state to obtain a DNA sample precluded the extraction of such [a] sample in the absence of any individualized suspicion that an offense had been committed." *United States v. Weikert*, 421 F. Supp. 2d 259, 264-65 (D. Mass. 2006) (emphasis added). The court found that the government's purpose was "to determine whether the searched individual has committed a crime," a purpose that is not beyond an ordinary law enforcement purpose and thus does not qualify as a "special need." *Id.* at 265 (*citing Edmond*, 531 U.S. at 37).

longstanding authority that prisoners have no expectation of privacy in their prison cells (in contrast to the privacy expectations resounding in their bodily integrity). *See Hudson v. Palmer*, 468 U.S 517, 526 (1984); *Bell v. Wolfish*, 441 U.S. 520, 545 (1979) (prisoners "do not forfeit all constitutional protections by reason of their conviction and confinement in prison"). It does not eliminate the need for the State to demonstrate a "special need" when it seeks to justify suspicionless mass intrusions of citizens' bodily integrity. Therefore, it is respectfully suggested that a writ of certiorari should issue to resolve the conflict within the federal courts of appeals regarding how to analyze the constitutionality of suspicionless DNA databanks.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

United States Court of Appeals,
Second Circuit.

Jason B. NICHOLAS, John Lewis, Philip Rabenbauer, Frank Solimine, Robert Pacini, Chester Flanders, Bennie Bates, Lymond Stephenson, Luis Mejia, Cecil Barrow, Dominic Deruggiero, Plaintiffs-Appellants,

Alvaro Sanchez, Plaintiff,

v.

Glenn S. GOORD, New York State Department of Correctional Services; Katherine Lapp, New York State Division of Criminal Justice Services; Medilabs, Inc.; Jessica Walsh, Defendants-Appellees.

No. 04-3887-PR.

Argued April 4, 2005.
Decided Nov. 28, 2005.

Before: WALKER, Chief Judge, LEVAL, Circuit Judge, and LYNCH, District Judge.

[Page numbering from 430 F.3d 652 in bold]

OPINION BY JOHN M. WALKER, JR., Chief Judge.

[655] Jason B. Nicholas, John Lewis, Philip Rabenbauer, Frank Solimine, Robert Pacini, Chester Flanders, Bennie Bates, Lymond Stephens[illegible], Luis Mejia, Cecil Barrow, and Dominic DeRuggiero (collec[illegible]ely, "plaintiffs") appeal from a judgment of the United States District Court for the Southern District of New York (Kevin T. Duffy, Judge) granting defendants' motion to dismiss. *Nicholas v. Goord*, No. 01 Civ. 7891, 2004 WL 1432533 (S.D.N.Y. June 24, 2004). Plaintiffs, who filed suit under 42 U.S.C. § 1983, challenge the constitutionality under the Fourth Amendment of New York's DNA statute, which requires certain classes of convicted felons to provide DNA samples to be maintained in a state database.

We affirm the district court's dismissal of plaintiffs' complaint, but rely on different reasoning. We hold that the constitutionality of New York's DNA statute is properly analyzed under the Fourth Amendment's "special needs" test; under that test, we find the statute constitutional.

BACKGROUND

I. Facts

Plaintiffs are felons convicted in New York who, at the time they brought this lawsuit, were incarcerated. They challenge the 1999 version of New York's DNA statute, which requires certain classes of convicted felons to provide DNA samples to be maintained in a state database. N.Y. Exec. Law § 995 et seq. (McKinney 1999). [FN1] New York's law is similar to the numerous DNA-indexing statutes that have been established at both the state and federal levels; it (1) mandates the extraction of DNA samples from certain classes of convicted felons, *id.* § 995-c(3); [FN2] (2) provides for DNA information obtained from those samples to be maintained in an index, or database, *id.*; (3) specifies that DNA samples will be analyzed only for markers "having value for law enforcement identification purposes," **[656]** *id.* § 995-c(5); [FN3] (4) allows for release of DNA records only in limited circumstances, *id.* § 995-c(6); [FN4] (5) penalizes the unauthorized disclosure or use of DNA records, *id.* § 995-f; and (6) requires that an individual's DNA records be expunged if his conviction is reversed or if he is pardoned, *id.* § 995-c(9). All nine plaintiffs have provided blood samples for purposes of the DNA index. [FN5]

> FN1. The statute, originally enacted in 1994, at first applied only to individuals convicted after January 1, 1996. 1994 N.Y. Laws, ch. 737, §§ 1, 3. In 1999, the statute was amended to apply to persons already convicted of certain offenses who were still serving a sentence. 1999 N.Y. Laws, ch. 560, § 9. Plaintiffs, all of whom were convicted before 1996 and were serving their sentences in 1999, became subject to the statute at that time. References to the statute

throughout this opinion are entirely to the 1999 version. The parties agree that subsequent amendments are not at issue.

FN2. The 1999 statute applied only to certain felonies (e.g., assault, homicide, rape, incest, escape, attempted murder, kidnaping, arson, burglary). *See* N.Y. Exec. Law § 995(7).

FN3. DNA databases like New York's utilize "junk DNA," which does not (as far as we know) contain genetic information. *See United States v. Kincade*, 379 F.3d 813, 818 (9th Cir. 2004) (en banc), *cert. denied*, 544 U.S. 924, 125 S.Ct. 1638, 161 L.Ed.2d 483 (2005).

FN4. Records may only be released (1) to law-enforcement agencies for identification of specified human remains or for identification purposes in criminal investigations, (2) to a defendant or his legal representative, or (3) after personally identifiable information has been removed, to authorized entities for the purpose of maintaining a population-statistics database. N.Y. Exec. Law § 995-c(6).

FN5. Although the statute originally required that DNA be extracted by blood sample, *see* 1994 N.Y. Laws, ch. 737, § 3, the statute was amended in 1999 to require only "a sample appropriate for DNA testing," 1999 N.Y. Laws, ch. 560, § 3. The state maintains that its "current normal practice ... is to [obtain DNA by taking] [b]uccal cheek swab[s]," but conceded at oral argument that plaintiffs have all had their blood drawn. We therefore confine our analysis to the extraction of plaintiffs' DNA via blood sample. In any event, even less intrusive measures of obtaining physiological data, such as

> cheek swabs, can constitute a search, since "[t]he ensuing chemical analysis of the sample" may also effect an "invasion of the [searchee's] privacy interests." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989).

Suing under 42 U.S.C. § 1983, plaintiffs claim that New York's statute violates the Fourth Amendment, which prohibits unreasonable searches and seizures. *See* U.S. Const. amend. IV. They seek to have their DNA records expunged from New York's database as well as money damages. [FN6] In addition to defendants-appellees Goord and Lapp ("State defendants"), plaintiffs named as defendants Medilabs, Inc., and its employee Jessica Walsh, who conducted DNA sampling for the state. [FN7]

> FN6. At the time of filing, two plaintiffs had not yet had their blood drawn; they initially sought to bar the state from doing so. At oral argument, however, the parties informed the court that all nine plaintiffs have had their blood drawn for DNA-indexing purposes. We therefore understand that all plaintiffs now seek the same remedies.

> FN7. Private parties are subject to the Fourth Amendment if they act as agents of the state. *See Skinner*, 489 U.S. at 614, 109 S. Ct. 1402; *United States v. Bennett*, 709 F.2d 803, 805 (2d Cir. 1983). Under 42 U.S.C. § 1983, private parties acting under color of state law can be held liable for violations of federal constitutional rights. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90 S. Ct. 1598, 26 L. Ed.2d 142 (1970); *Fries v. Barnes*, 618 F.2d 988, 990-91 (2d Cir. 1980).

II. Proceedings Below

On February 6, 2003, Magistrate Judge Gabriel W.

Gorenstein issued a report recommending that the case be dismissed. *Nicholas v. Goord*, No. 01 Civ. 7891, 2003 WL 256774 (S.D.N.Y. Feb. 6, 2003) ("Report-Recommendation "). He first concluded that DNA sampling under the statute constituted a "search and seizure implicating the Fourth Amendment." *Id.* at *3. After extensively analyzing the relevant case law, the magistrate judge found that New York's DNA statute was subject to the "special needs" test first articulated by Justice Blackmun in his concurrence in *New Jersey v. T.L.O.*, 469 U.S. 325, 351, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985) (Blackmun, J., concurring), and applied by this court in analyzing Connecticut's **[657]** DNA statute, *see Roe v. Marcotte*, 193 F.3d 72, 79-82 (2d Cir. 1999). In Magistrate Judge Gorenstein's view, recent Supreme Court cases "require[d] that DNA indexing statutes ... be analyzed solely in accordance with the 'special needs' doctrine." Report-Recommendation, 2003 WL 256774, at *11.

Following that doctrine, the magistrate judge conducted a two-part inquiry. He first asked whether New York's law served a " 'special need, beyond the normal need for law enforcement.' " *Id.* In doing so, however, he declined to rely on the special need that we had identified in Marcotte, in part because that case preceded two significant intervening Supreme Court decisions concerning the special-needs test, *see id.* at *14, and in part because he was unconvinced that New York's DNA statute was meant to deter recidivism, the special need relied upon in Marcotte, *see id.* at *12. Ultimately, the magistrate judge concluded that the primary purpose of New York's DNA statute was "to maintain information available to solve future crimes," and deemed that purpose a special need. *Id.* at *13. The magistrate judge then applied a balancing test and found that the interests of the state in maintaining a database to aid in crime investigation outweighed the minimal intrusion on plaintiffs' privacy interests. The magistrate judge emphasized plaintiffs' greatly reduced expectation of privacy as prisoners, *id.* at *16-*17, and the "blanket approach" of the statute, which reduced the possibility of arbitrary conduct by the state, *id.* at *18.

The district court reached the same conclusion by a different route. The district court first expressed skepticism as to whether the

Fourth Amendment even applied, noting that it was "not necessarily convinced that the Magistrate Judge was correct to so quickly dismiss the question," but ultimately decided, in the absence of any argument from the state, to assume that the Fourth Amendment did apply. *Nicholas*, 2004 WL 1432533, at *2. Rather than conducting the special-needs inquiry, however, the district court found that under the Supreme Court's decision in *United States v. Knights*, 534 U.S. 112, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001), a general balancing test was more appropriate. *See Nicholas*, 2004 WL 1432533, at *3. The district court therefore explicitly declined to follow Marcotte or the magistrate judge's recommendation, *id.* at *3 n. 7, and even suggested that the statute might not survive under the special-needs test, *id.* at *4 (arguing that "collecting DNA is part and parcel" of the state's general interest in law enforcement, which would not qualify as a special need).

Instead of engaging in a special-needs inquiry, therefore, the district court proceeded directly to consider the statute under the traditional Fourth Amendment balancing test. After concluding that, in light of the totality of the circumstances, the state's significant interest in "having information readily available to aid criminal investigations" outweighed plaintiffs' minimal interest in not having to submit their DNA to indexing, the district court dismissed the complaint. *Id.* at *5-*6.

This appeal followed.

DISCUSSION

We review de novo a district court's grant of a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). [FN8] *See, e.g., W. Mohegan Tribe & Nation v. Orange County*, **[658]** 395 F.3d 18, 20 (2d Cir. 2004) (per curiam). We accept as true the allegations in the complaint and draw all reasonable inferences in plaintiffs' favor. *Id.*

FN8. Medilabs and Walsh submitted a motion for judgment on the pleadings, pursuant to Federal Rule

of Civil Procedure 12(c), but such a motion is evaluated under the same standard as a Rule 12(b)(6) motion to dismiss. *See Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir. 1994).

I. The Applicability of the Fourth Amendment

As a preliminary matter, we reject the district court's sua sponte suggestion that the Fourth Amendment might not apply to New York's DNA statute because plaintiffs may not have a reasonable expectation of privacy in their DNA. *See Nicholas*, 2004 WL 1432533, at *2; *see generally Oliver v. United States*, 466 U.S. 170, 177, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984) ("The Amendment [protects] only those expectation[s] that society is prepared to recognize as reasonable." (internal quotation marks omitted)). The state did not dispute the applicability of the Fourth Amendment below, nor does it on appeal. Our sister circuits have consistently found, as we presumed in *Marcotte*, 193 F.3d at 77, that prisoner DNA extraction is subject to the Fourth Amendment. *See United States v. Sczubelek*, 402 F.3d 175, 182 (3d Cir. 2005); *Padgett v. Donald*, 401 F.3d 1273, 1277 (11th Cir. 2005); *United States v. Kincade*, 379 F.3d 813, 821 n. 15 (9th Cir. 2004) (en banc), *cert. denied*, 544 U.S. 924, 125 S. Ct. 1638, 161 L. Ed. 2d 483 (2005); *Green v. Berge*, 354 F.3d 675, 676 (7th Cir. 2004); *Groceman v. DOJ*, 354 F.3d 411, 413 (5th Cir. 2004); *Boling v. Romer*, 101 F.3d 1336, 1340 (10th Cir. 1997); *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992).

Moreover, while we agree with the district court that fingerprinting and DNA indexing serve similar purposes, *see Nicholas*, 2004 WL 1432533, at *2 n. 4; *see also infra* Part III.B, and while the Supreme Court has suggested that the former may not fall within the Fourth Amendment's scope, *see United States v. Dionisio*, 410 U.S. 1, 14-15, 93 S. Ct. 764, 35 L. Ed. 2d 67 (1973); *but cf. id.* at 39, 93 S. Ct. 764 (Marshall, J., dissenting), the Court has also recognized a distinction between non-intrusive means of obtaining physical evidence (such as fingerprinting) and more invasive measures (such as drawing blood), *id.* at 14-15, 93 S.Ct. 764. The

latter are, under *Skinner*, deemed Fourth Amendment searches. *See* 489 U.S. at 616, 109 S. Ct. 1402. The distinction between the physical intrusion required to take a fingerprint and the intrusion required to draw a blood sample is thus constitutionally significant.

Finally, to the extent that the district court relied on Second Circuit cases holding that prisoners have a reduced expectation of privacy, *see, e.g., Willis v. Artuz*, 301 F.3d 65, 69 (2d Cir. 2002) (prisoners lack expectation of privacy in prison cell), we note that prisoners retain a right to bodily privacy, even if that right is limited by institutional and security concerns, *see Marcotte*, 193 F.3d at 78; *Covino v. Patrissi*, 967 F.2d 73, 78 (2d Cir. 1992). Drawing blood from inmates thus effects a constitutionally cognizable intrusion on prisoners' expectation of bodily privacy, though that expectation may be diminished. Accordingly, we find that the extraction and analysis of plaintiffs' blood for DNA-indexing purposes constituted a search implicating the Fourth Amendment.

From this point, our analysis proceeds in two parts: We first decide which Fourth Amendment test to apply to New York's DNA statute, and then we analyze the statute's constitutionality under that test.

II. Special-Needs Test

A. Special-Needs or General Balancing Test?

To date, both state and federal DNA-indexing statutes have withstood Fourth **[659]** Amendment challenges. [FN9] *See Sczubelek*, 402 F.3d at 184; *Kincade*, 379 F.3d at 830-31 & n. 25. Courts remain divided, however, as to the appropriate test to apply. The Second, Seventh, and Tenth Circuits have applied the special-needs test. *See Marcotte*, 193 F.3d at 78-79; *Green*, 354 F.3d at 677-78; *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003). [FN10] The Third, Fourth, Fifth, Ninth, and Eleventh Circuits have applied a general balancing test, *see Sczubelek*, 402 F.3d at 184; *Jones*, 962 F.2d at 307; *Groceman*, 354 F.3d at 413; *Kincade*, 379 F.3d at 832; *Padgett*, 401 F.3d at 1280, although the Third and Ninth

Circuit decisions prompted impassioned dissents, *see Sczubelek*, 402 F.3d at 189-204 (McKee, J., dissenting); *Kincade*, 379 F.3d at 842-71 (Reinhardt, J., dissenting); *id.* at 871-75 (Kozinski, J., dissenting); *id.* at 875- 76 (Hawkins, J., dissenting). [FN11]

FN9. Courts have also upheld DNA-indexing statutes in the face of other constitutional challenges. *See, e.g., Doe v. Moore*, 410 F.3d 1337 (11th Cir. 2005) (rejecting due-process, separation-of-powers, and equal-protection challenges to DNA-indexing provisions of Florida's sex-offender statute); *Sczubelek*, 402 F.3d at 187-89 (rejecting separation-of-powers challenge to federal statute); *Padgett*, 401 F.3d at 1280-81 (rejecting substantive due-process challenge to Georgia's DNA statute).

FN10. Prior to *Kimler*, the Tenth Circuit applied a general balancing test to Colorado's DNA statute. *See Boling*, 101 F.3d at 1340. *Kimler*, however, applied the special-needs test without commenting on *Boling*. See 335 F.3d at 1146.

FN11. Indeed, it is not so clear that proponents of the general balancing test prevailed in the Ninth Circuit. *Kincade* was decided by eleven judges sitting en banc. Five judges voted to uphold the federal DNA statute under a general balancing test, and a sixth judge voted to uphold the statute under the special-needs exception. The five dissenters would have applied the special-needs test to strike down the statute. *See Kincade*, 379 F.3d at 842 n. 1 (Reinhardt, J., dissenting). Thus, the special-needs test received six votes in *Kincade*, while the general balancing test only received five. *See also Moreno v. Baca*, 400 F.3d 1152, 1157 n. 2 (9th Cir. 2005) ("[In Kincade], we were unable to resolve the proper test to be applied ....").

In *Marcotte*, we applied the special-needs test to the DNA-indexing requirement under Connecticut's sex-offender statute, which is similar to New York's statute. [FN12] *See Marcotte*, 193 F.3d at 75 (describing Connecticut statute). Plaintiffs, as might be expected, argue that *Marcotte* should be followed and the more stringent special-needs test applied. Our analysis of New York's statute must, however, take into account not only *Marcotte*, but also several significant intervening Supreme Court cases. Particularly relevant are the Supreme Court's decisions in *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000), *Ferguson v. City of Charleston*, 532 U.S. 67, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001), and *Illinois v. Lidster*, 540 U.S. 419, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004), which clarify the circumstances in which the special-needs exception applies and how courts should apply it. Of course, we are bound by our own precedent "unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court en banc." *BankBoston, N.A. v. Sokolowski*, 205 F.3d 532, 534-35 (2d Cir. 2000) (per curiam). In light of these subsequent **[660]** Supreme Court decisions, however, we are free to revisit *Marcotte*'s reasoning, and, in light of the judicial views reflected in the circuit split, we think it prudent to do so.

> FN12. Specifically, Connecticut's statute, Conn. Gen.Stat. § 54- 102g, applies to persons convicted of certain offenses after October 1, 1994 and sentenced to incarceration, as well as those convicted before October 1, 1994 of certain offenses, but incarcerated at that time. *Marcotte*, 193 F.3d at 75. Connecticut's statute requires that DNA be obtained through blood sample, specifies that DNA be tested for identification purposes, and provides that the results of DNA testing be kept confidential. *Id.*

B. The Evolution of the Special-Needs Exception

The Fourth Amendment prohibits unreasonable searches and

seizures. In the criminal-law context, a warrant and probable cause are usually required. *See Mincey v. Arizona*, 437 U.S. 385, 390, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). Warrantless searches must generally fit within "a few specifically established and well-delineated exceptions," *id.* (internal quotation marks omitted), such as the warrantless search pursuant to a lawful arrest, *see Chimel v. California*, 395 U.S. 752, 762-63, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). And warrantless searches must still generally be based upon probable cause, *see T.L.O.*, 469 U.S. at 340, 105 S. Ct. 733, though the Court has recognized that probable cause, which is "peculiarly related to criminal investigations," *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 828, 122 S. Ct. 2559, 153 L. Ed. 2d 735 (2002) (internal quotation marks omitted), is not an "irreducible requirement of a valid search," *T.L.O.*, 469 U.S. at 340, 105 S. Ct. 733. However, and crucially for our purposes, where neither warrant nor probable cause is required, searches must usually be based upon some quantum of individualized suspicion; suspicionless searches are constitutional "only [in] limited circumstances." *Edmond*, 531 U.S. at 37, 121 S. Ct. 447.

The special-needs exception, which developed against this backdrop of Fourth Amendment requirements, was first enunciated by Justice Blackmun in his *T.L.O.* concurrence, in which he clarified that exceptions to the usual warrant and probable-cause requirements were appropriate only where "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *T.L.O.*, 469 U.S. at 351, 105 S. Ct. 733 (Blackmun, J., concurring). As originally formulated, the special-needs exception was thus aimed at evaluating the constitutionality of warrantless searches, but did not address the appropriate standard for evaluating suspicionless searches. *See also Ferguson*, 532 U.S. at 74 n. 7, 121 S. Ct. 1281. Indeed, *T.L.O.* itself involved a warrantless search based on individualized suspicion. *See T.L.O.*, 469 U.S. at 342 n. 8, 105 S. Ct. 733 ("Because the search ... was based upon an individualized suspicion ... we need not consider the circumstances that might justify school authorities in conducting searches unsupported by individualized suspicion.").

Warrantless searches that serve a special need and are based on individualized suspicion have been upheld by the Court several times. *See, e.g., O'Connor v. Ortega*, 480 U.S. 709, 725, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987) (warrantless search of employee workspace based on reasonable suspicion of employee misconduct). As the government implicitly concedes, however, the New York statute establishes a suspicionless-search regime, not just a warrantless one. *Cf. United States v. Lifshitz*, 369 F.3d 173, 188 (2d Cir. 2004) ("In Marcotte, we explicitly distinguished searches based solely on an individual's status as a convicted sex offender from searches based upon at least some level of individualized suspicion."). Relevant to this appeal, therefore, are those cases concerning suspicionless searches.

Such searches, which have historically been treated as a "closely guarded category," *Chandler v. Miller*, 520 U.S. 305, 309, 117 S. Ct. 1295, 137 L. Ed. 2d 513 (1997), have been upheld only in limited circumstances, **[661]** including searches conducted at the border, [FN13] in prisons, [FN14] and at airports and entrances to government buildings; [FN15] administrative or regulatory searches, particularly of closely regulated businesses; [FN16] student and employee drug tests; [FN17] information-seeking checkpoints; [FN18] and searches of probationers' residences. [FN19] *See also Kincade*, 379 F.3d at 822-23 (describing categories of suspicionless searches).

> FN13. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976) (finding constitutional reasonably located permanent checkpoints for brief stops and questioning, for purpose of policing the border).
>
> FN14. *See Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (upholding, on penological and institutional-safety grounds, suspicionless visual body-cavity searches of inmates following contact visits).

FN15. *See Chandler*, 520 U.S. at 323, 117 S. Ct. 1295 ("[W]here the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'--for example, searches now routine at airports and at entrances to courts and other official buildings.").

FN16. *See New York v. Burger*, 482 U.S. 691, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987) (upholding administrative inspection of automobile junkyards); *Camara v. Mun. Ct. of S.F.*, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967) (upholding municipal area inspections to monitor compliance with building safety codes).

FN17. *See Earls*, 536 U.S. 822, 122 S. Ct. 2559 (upholding random, suspicionless drug testing of students involved in extracurricular activities); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995) (same); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989) (upholding suspicionless drug testing of certain customs employees); *Skinner*, 489 U.S. 602, 109 S. Ct. 1402 (upholding testing of railroad employees involved in train accidents).

FN18. *See Lidster*, 540 U.S. 419, 124 S. Ct. 885 (upholding brief stops of motorists at checkpoint where police sought information about recent hit-and-run accident).

FN19. *See Griffin v. Wisconsin*, 483 U.S. 868, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987) (upholding searches of probationer's home because of state's interest in supervising probationers).

What unifies these cases, despite their varied contexts, is that

in each instance, the Court found that the suspicionless-search regime at issue served some special need distinct from normal law-enforcement needs. In *Martinez-Fuerte*, for example, the Court "emphasized the difficulty of effectively containing illegal immigration at the border itself." *Edmond*, 531 U.S. at 38, 121 S. Ct. 447 (construing *Martinez-Fuerte*). In *Bell v. Wolfish*, the Court's concern was the "significant and legitimate security interests of the [prison] institutions." 441 U.S. at 559-60, 99 S. Ct. 1861. In *Von Raab*, *Skinner*, *Vernonia*, and *Earls*--all involving drug tests--the Court found that the purpose of the regime "was one divorced from the State's general interest in law enforcement." *Ferguson*, 532 U.S. at 79, 121 S. Ct. 1281 (construing those cases); *see also id.* at 80 n. 16, 121 S. Ct. 1281 (noting that in each of the four cases, results of the drug tests could not be used in criminal prosecution).

Thus, although the special-needs exception was originally formulated in the context of warrantless searches, the evolution of the Court's Fourth Amendment jurisprudence suggests that the doctrine has increasingly become the test employed by the Court in suspicionless search cases. *See also Chandler*, 520 U.S. at 313, 117 S. Ct. 1295 ("[P]articularized exceptions to the main rule [requiring individualized suspicion] are sometimes warranted based on special needs, beyond the normal need for law enforcement." (internal quotation marks omitted)). Indeed, in two recent **[662]** cases, the relationship between the special-needs exception and suspicionless-search regimes has become explicit.

In 2001, the court decided *Edmond*, which concerned an Indianapolis checkpoint program "whose primary purpose [was] the discovery and interdiction of illegal narcotics." 531 U.S. at 34, 121 S. Ct. 447. After noting that it had "never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing," *id.* at 41, 121 S. Ct. 447, the Court held the program unconstitutional, emphasizing that it had recognized "only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion," *id.* Of particular importance was *Edmond*'s characterization of the Court's own special-needs jurisprudence: "[W]e have upheld certain regimes

of suspicionless searches where the program was designed to serve special needs, beyond the normal need for law enforcement," as well as limited searches for "certain administrative purposes." *Id.* at 37, 121 S. Ct. 447 (internal quotation marks omitted) (emphasis added). And Chief Justice Rehnquist in dissent seemed to assume that suspicionless searches must satisfy the special-needs inquiry. *See id.* at 54, 121 S. Ct. 447 (Rehnquist, C.J., dissenting) ("The 'special needs' doctrine, which has been used to uphold suspicionless searches performed for reasons unrelated to law enforcement, is an exception to the general rule that a search must be based on individualized suspicion of wrongdoing.").

The following year the Court decided *Ferguson*, in which the petitioners challenged a hospital program that tested their urine for cocaine use. *See* 532 U.S. at 71-73, 121 S. Ct. 1281. The Court found that the "immediate objective of the searches was to generate evidence for law enforcement purposes," *id.* at 83, 121 S. Ct. 1281, and deemed the program unconstitutional under the special-needs test, *id.* at 85, 121 S. Ct. 1281. In so holding, the Court again indicated that the special-needs test applied to searches conducted in "the absence of a warrant or individualized suspicion." 532 U.S. at 79, 121 S. Ct. 1281.

Edmond and *Ferguson* are notable for two reasons. First, they indicate that searches conducted in the absence of individualized suspicion are subject to the special-needs test. While the special-needs exception was originally developed in relation to the Fourth Amendment's warrant requirement, cases like *Edmond* and *Ferguson* have increased the doctrine's importance in a subcategory of warrantless searches--suspicionless searches. *See N.G. v. Connecticut*, 382 F.3d 225, 236-37 (2d Cir. 2004) (noting that when it comes to "searches undertaken pursuant to a general scheme without individualized suspicion," the Supreme Court has applied the special-needs test and has held that "a primary purpose to advance the general interest in crime control will not suffice" (internal quotation marks and citations omitted)). In this regard, we disagree with our colleagues on the Ninth Circuit, who observed in *Kincade* that "[t]he Court has long understood special needs analysis to be

triggered not by a complete absence of suspicion, but by a departure from the Fourth Amendment's warrant-and-probable cause requirements." *Kincade*, 379 F.3d at 829. As explained above, while *T.L.O.* and other early special-needs cases employed the exception in the context of warrantless searches, the Court's recent Fourth Amendment jurisprudence has increasingly associated the special-needs test with suspicionless-search regimes.

Second, *Edmond* and *Ferguson* clarify what may qualify as a special need. *Edmond* asserts that a program serving a **[663]** "general interest in crime control" will not suffice. 531 U.S. at 44, 121 S. Ct. 447. *Edmond* rejected the state's argument that the checkpoint program served a non-law-enforcement need because it was broadly aimed at society's drug problem: "If we were to rest the case at this high level of generality, there would be little check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose." *Id.* at 42, 121 S. Ct. 447. *Ferguson* reiterated *Edmond*'s holding, finding that a search whose "immediate objective ... was to generate evidence for law enforcement purposes" was unconstitutional, even if its "ultimate goal" was to stop substance abuse by pregnant women. 532 U.S. at 82-83, 121 S. Ct. 1281. We thus read *Edmond* and *Ferguson* to call for the application of the special-needs test in cases involving suspicionless searches, and to require that such searches serve as their immediate purpose an objective distinct from the ordinary evidence gathering associated with crime investigation. *See also Chandler*, 520 U.S. at 314, 117 S. Ct. 1295 (defining special needs as those "other than crime detection").

Our understanding of the special-needs doctrine and our reading of *Edmond* and *Ferguson* must, however, also take into account the Court's more recent decision in *Illinois v. Lidster*. That case concerned a highway checkpoint set up by police one week after a hit-and-run accident "at about the same time of night and at about the same place" as the accident; the checkpoint was "designed to obtain more information about the accident from the motoring public." 540 U.S. at 422, 124 S. Ct. 885. In upholding the checkpoint program, the Court noted that it "differ[ed] significantly

from that in *Edmond*," emphasizing in particular that the checkpoint's "primary law enforcement purpose was not to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others." *Id.* at 423, 124 S. Ct. 885. The Court distinguished between an "information-seeking kind of stop" like the one at issue in *Lidster*, and the traffic stop at issue in *Edmond*, which served the state's "general interest in crime control." *Id.* at 424, 124 S. Ct. 885 (internal quotation marks omitted). And, in a seeming effort to expand the boundaries of the special-needs exception, the Court expressly observed that *Edmond*'s prohibition on searches conducted pursuant to a "general interest in crime control" did "not refer to every law enforcement objective," but rather only to normal law-enforcement objectives. [FN20] *Id.* (internal quotation marks omitted). *Lidster* explained that not all law-enforcement concerns would be deemed to fall outside of the special-needs exception; rather, some "special law enforcement concerns will sometimes justify [checkpoint seizures] without individualized suspicion." *Id.* [FN21]

> FN20. The dissenters also recognized "a valid and important distinction between seizing a person to determine whether she has committed a crime and seizing a person to ask whether she has any information." *Id.* at 428, 124 S.Ct. 885 (Stevens, J., concurring in part and dissenting in part). They agreed that in the latter case, *Edmond* did not require that the seizure be deemed per se unconstitutional. *Id.*

> FN21. At oral argument, plaintiffs argued that *Lidster* is inapplicable in this case because (1) *Lidster* concerned a seizure, and (2) the Court has treated suspicionless checkpoint seizures differently from suspicionless searches. We reject the argument. Plaintiffs are correct insofar as the Court, in a footnote in Ferguson, observed that it had

> historically distinguished between "seizure cases in which we have applied a balancing test," and cases involving searches of the body or the home, in which it had applied the special-needs test. 532 U.S. at 83 n. 21, 121 S. Ct. 1281. But *Lidster*, which postdates Ferguson, does not distinguish between searches and seizures in discussing the special-needs test. Rather, *Lidster* discusses the scope of the special-needs exception and Edmond without reference to any distinction between searches and seizures. Moreover, drawing a sharp distinction between search cases and seizure cases is unhelpful in this instance because the extraction and analysis of bodily fluids may constitute a seizure as well as a search. *See Skinner*, 489 U.S. at 616-17 & n. 4, 109 S.Ct. 1402.

[664] C. Analysis

With *Edmond*, *Ferguson*, and *Lidster* in mind, we now consider plaintiffs' contention that the district court erred in applying the traditional Fourth Amendment balancing test, rather than the special-needs test. Plaintiffs urge us to follow the methodology employed in *Marcotte* and to apply the more stringent special-needs test. [FN22] Certainly, the Court's emphasis in its recent cases on applying the special-needs test to suspicionless searches strongly suggests, if it does not require, that we should continue to apply the special-needs test to DNA-indexing statutes as we did in *Marcotte*.

> FN22. We find puzzling the Third Circuit's comment in *Sczubelek* that the special-needs inquiry is less rigorous than the general balancing test. *See* 402 F.3d at 184. The special needs exception requires the court to ask two questions. First, is the search justified by a special need beyond the ordinary need for normal law enforcement? Second, if the search does serve a special need, is the search reasonable when the government's special need is

weighed against the intrusion on the individual's privacy interest? *See N.G.*, 382 F.3d at 230-31; Report-Recommendation, 2003 WL 256774, at *15. A general balancing test, on the other hand, only requires the court to balance the government's interest in conducting the search against the individual's privacy interests. *See, e.g., Kincade*, 379 F.3d at 836.

Defendants, however, maintain that a general Fourth Amendment balancing inquiry is more appropriate and argue that we should affirm the district court's approach. Defendants offer two primary reasons for departing from *Marcotte*, which we now consider. [FN23]

FN23. The district court also relied on *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979), for the proposition that a balancing test may be used on searches of inmates conducted on "less than probable cause." *See Nicholas*, 2004 WL 1432533, at *3. We reject the argument that *Wolfish* justifies application of a balancing test to prisoners, given that the Supreme Court itself, as well as this court, have characterized *Wolfish* as a special-needs case because of its focus on institutional safety concerns unique to prisons. *See Skinner*, 489 U.S. at 619, 109 S. Ct. 1402 (listing *Wolfish* as a special-needs case); *N.G.*, 382 F.3d at 231; *see also Wolfish*, 441 U.S. at 559, 99 S. Ct. 1861 (noting "serious security dangers" of detention facilities).

1. *United States v. Knights*

Defendants first contend that the Supreme Court's decision in *United States v. Knights*, 534 U.S. 112, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001), justifies application of a traditional balancing test. That case, on which several courts, including the district court, have relied in dispensing with the special-needs test, *see Nicholas*, 2004

WL 1432533, at *3; *Sczubelek*, 402 F.3d at 186; *Padgett*, 401 F.3d at 1279-80; *Kincade*, 379 F.3d at 830; *Groceman*, 354 F.3d at 413, concerned a probationer whose house and residence the police searched. The police had long suspected *Knights* of being involved in various acts of vandalism. *Knights*, 534 U.S. at 114, 122 S. Ct. 587. The Court observed that the search, which was conducted pursuant to a search condition of *Knights*'s probation order, [FN24] was **[665]** "supported by reasonable suspicion." *Id.* In upholding the search, the Court explained that searches of probationers conducted pursuant to probation conditions did not need to serve a special need, such as a probationary purpose, to be deemed constitutional. *Id.* at 117-18, 122 S. Ct. 587. The Court found that, in light of the reasonable suspicion supporting the search, and in light of *Knights*'s "significantly diminished ... expectation of privacy," *id.* at 120, 122 S. Ct. 587, the search satisfied the Fourth Amendment's reasonableness requirement.

> FN24. The probation order required that *Knights*, inter alia, submit his "person, property, place of residence, vehicle, personal effects, to search at any time, with or without a search warrant, warrant of arrest or reasonable cause." 534 U.S. at 114, 122 S. Ct. 587.

Courts that have relied upon *Knights* as justifying the application of a general balancing test to DNA-indexing statutes have emphasized Knights's status as a probationer and his knowledge of the probation search condition, which reduced his expectation of privacy. *See, e.g., Sczubelek*, 402 F.3d at 183 (noting that Court had viewed *Knights*'s probation search condition as the " 'salient circumstance'" (*quoting Knights*, 534 U.S. at 118, 122 S. Ct. 587)); *Padgett*, 401 F.3d at 1279 ("Key to the Court's ruling was *Knights*' status as probationer."); *Kincade*, 379 F.3d at 827-28. Because the Court emphasized *Knights*'s status as a probationer subject to a probation search condition, and because the Court applied a general balancing inquiry, our sister circuits have assumed that those two facts are causally related. They have thus interpreted the Court's willingness to employ a general balancing test, rather than the

special-needs test, as an indication that a general balancing test is appropriate wherever the person searched has a reduced expectation of privacy, regardless of whether the search is supported by individualized suspicion. *See, e.g., id.* at 832.

We are unwilling to leap to that conclusion. The Court's decision to employ a traditional balancing test in *Knights* must be viewed in context. In particular, we think it telling that the Court emphasized, from the very first paragraph of its opinion, that the search of Knights's apartment was "supported by reasonable suspicion." *Knights*, 534 U.S. at 114, 122 S. Ct. 587; *see also id.* at 121-22, 122 S. Ct. 587 (noting repeatedly that the search was supported by reasonable suspicion). And this court has previously construed *Knights* as limited to situations involving some quantum of individualized suspicion. *See Lifshitz*, 369 F.3d at 180-81 ("In *Knights* ... [the Court] decided only that the particular search at issue met the requirements of the Fourth Amendment, because it was based on reasonable suspicion."). Indeed, the Court expressly noted that it was "not address[ing] the constitutionality of a suspicionless search because the search in this case was supported by reasonable suspicion." *Knights*, 534 U.S. at 120 n. 6, 122 S. Ct. 587. In light of the Court's emphasis on the existence of reasonable suspicion in *Knights*, its decision to employ a general balancing test in that case was arguably due as much to the existence of individualized suspicion as it was to Knights's reduced expectation of privacy under the search condition. As Judge Reinhardt explained in his *Kincade* dissent, in *Knights*,

> The Court distinguished the "special needs" line of cases, but it did so cautiously, explaining that its departure from that framework was justified only by the combination of all of the circumstances present. Those circumstances included the reduced expectation of privacy held by Knights on account of the conditions of his probation. [They] also included, as the Court emphasized repeatedly, the fact that the search was supported by reasonable suspicion[.]

[666] *Kincade*, 379 F.3d at 861 (Reinhardt, J., dissenting); *see also Sczubelek*, 402 F.3d at 196 (McKee, J., dissenting) ("[T]here was no real issue [in *Knights*] about whether the search was justified by a reasonable suspicion .... Rather, the issue was whether the warrantless search of Knights' private residence [was constitutional].").

We thus reject defendants' argument that *Knights* justifies applying the traditional Fourth Amendment balancing test to New York's DNA statute. In light of the Court's emphasis in its recent Fourth Amendment cases on applying the special-needs test to suspicionless-search regimes, *see, e.g., Chandler*, 520 U.S. at 313-14, 117 S. Ct. 1295; *Edmond*, 531 U.S. at 37, 121 S. Ct. 447, as well as the Court's focus in *Knights* on the existence of reasonable suspicion in that case, we decline to construe *Knights* as permitting us to apply a general balancing test to suspicionless searches. The Supreme Court has never applied a general balancing test to a suspicionless-search regime. *See Kincade*, 379 F.3d at 862 (Reinhardt, J., dissenting). Until the Supreme Court expressly adopts such an approach, the more prudent route, and the route more consonant with the values underlying the Fourth Amendment, *see Vernonia*, 515 U.S. at 667, 115 S. Ct. 2386 (O'Connor, J., dissenting) ("For most of our constitutional history, mass, suspicionless searches have been generally considered per se unreasonable within the meaning of the Fourth Amendment."), is to construe *Knights* as dispensing with the special-needs test not solely because of the probation search condition, but also because of the existence of individualized suspicion. *See Kincade*, 379 F.3d at 863 (Reinhardt, J., dissenting).

2. Reduced Expectation of Privacy

Defendants also contend that the searches conducted in *Ferguson* and *Edmond* are distinguishable from the search at issue in this case, and therefore those cases do not apply. Specifically, defendants argue that neither *Edmond* nor *Ferguson* involved a "class of individuals [that] has a diminished expectation of privacy," whereas this case involves prison inmates, who have a "substantially

diminished expectation of privacy in their identifying information." [FN25] *See also Kincade*, 379 F.3d at 832; *Nicholas*, 2004 WL 1432533, at *3. In other words, defendants and those courts that have applied Knights argue that while suspicionless searches of the general public may require scrutiny under the special-needs test, suspicionless searches of individuals with a reduced expectation of privacy are subject only to the more lenient balancing test.

> FN25. At the time of filing, all plaintiffs were incarcerated. We discuss further below the fact that some plaintiffs have since been released.

The problem with this argument is that neither *Ferguson* nor *Edmond* rested upon the plaintiffs' undiminished expectation of privacy. Rather, the key to each case was the program's law-enforcement purpose. *See Ferguson*, 532 U.S. at 79, 121 S. Ct. 1281 (noting that the "critical difference between [earlier] drug-testing cases and this one ... lies in the nature of the 'special need' asserted as justification for the warrantless searches"); *id.* at 83-84, 121 S. Ct. 1281 (finding "critical" the fact that the "immediate objective of the searches was to generate evidence for law enforcement purposes " (emphasis in original)); *Edmond*, 531 U.S. at 48, 121 S. Ct. 447 ("Because the primary purpose of the Indianapolis checkpoint program is ultimately indistinguishable from the general interest in crime control, the checkpoints violate the Fourth Amendment."). Moreover, as plaintiffs point out, almost every **[667]** special-needs case considered by the Supreme Court has involved individuals with a diminished expectation of privacy. *See, e.g., Vernonia*, 515 U.S. at 657, 115 S. Ct. 2386; *Earls*, 536 U.S. at 830, 122 S. Ct. 2559. Indeed, this court has previously held that a "diminished expectation of privacy" is a principal criterion of special-needs cases. *Lifshitz*, 369 F.3d at 186 ("[T]hose subject to the search must enjoy a diminished expectation of privacy, partly occasioned by the special nature of their situation, and partly derived from the fact that they are notified in advance of the search policy.").

We therefore cannot agree with defendants' contention that a reduced expectation of privacy allows courts to dispense with the

special-needs test in cases involving suspicionless-search regimes. Indeed, we view such logic with some concern, in light of the wide swath of the general public who at one point or another has had a reduced expectation of privacy. *See, e.g., Lidster*, 540 U.S. at 424, 124 S. Ct. 885 (motorists); *Earls*, 536 U.S. at 831-32, 122 S. Ct. 2559 (student athletes and students participating in extracurricular activities); *Vernonia*, 515 U.S. at 656, 115 S. Ct. 2386 (public-school students); *Von Raab*, 489 U.S. at 672, 109 S. Ct. 1384 (government employees involved in drug interdiction); *Skinner*, 489 U.S. at 627, 109 S. Ct. 1402 (employees participating "in an industry that is regulated pervasively to ensure safety"). Were we to apply the general balancing test to New York's statute simply because the individuals searched had a diminished expectation of privacy, we would be approving the application of a considerably more lenient standard of review to suspicionless-search regimes that have heretofore been subject to a more searching inquiry. We decline so to relax our review of such regimes, which have historically been regarded as a "closely guarded category." *Chandler*, 520 U.S. at 309, 117 S. Ct. 1295; *see also Edmond*, 531 U.S. at 37, 121 S. Ct. 447.

We therefore reaffirm the approach we took in *Marcotte* and conclude that plaintiffs' Fourth Amendment challenge to New York's DNA-indexing statute is properly analyzed under the special-needs test. Although courts have unanimously upheld DNA-indexing statutes whether they have applied the special-needs test or the general Fourth Amendment balancing test, the test applied continues to matter, especially since the reasons for adopting a particular test will inevitably have consequences in other search contexts. We therefore continue to hold suspicionless searches to the higher standard of review embodied in the special-needs inquiry.

III. Analysis Under the Special-Needs Test

A. Does New York's Statute Serve a Special Need?

In determining whether New York's DNA statute can be justified under the special-needs exception, we first ask what the statute's primary purpose is, mindful that it is the statute's immediate

rather than ultimate objective that is relevant. *See Ferguson*, 532 U.S. at 82-83, 121 S. Ct. 1281. In *Marcotte*, we considered the constitutionality of Connecticut's DNA statute, which, inter alia, required covered sex offenders to submit a blood sample for DNA indexing. *See* 193 F.3d at 74. We recognized that the statute was "not motivated by concerns for inmate safety and health, institutional order, or discipline" that have usually supported a special-needs exception in the prison context. *Id.* at 78. Nevertheless, we found that the statute did serve special needs, in that it would (1) aid law enforcement in solving past and future crimes, and (2) deter recidivism. *Id.* at 79.

[668] Although we conclude that New York's statute likewise serves a special need, distinguishable from ordinary law-enforcement needs, we do not think that the immediate objective of the statute is to deter recidivism, although such deterrence may be a valuable byproduct. [FN26] We instead agree with the magistrate judge that close examination of the statute reveals that its "primary purpose is to create a DNA database to assist in solving crimes should the investigation of such crimes permit resort to DNA testing of evidence." Report-Recommendation, 2003 WL 256774, at *12. The website of New York's Division of Criminal Justice Services states that "[t]he primary function of the DNA Databank is to maintain DNA profiles of convicted offenders that can be used by law enforcement to identify a perpetrator of a crime when DNA evidence is retrieved from a crime scene." Joint Appendix ("JA") at 35. [FN27] By contrast, the website makes no mention of deterring recidivism and, as the magistrate judge pointed out, the legislative history surrounding both the 1994 enactment of the statute and its 1999 amendment is "devoid of references to identifying human remains and discouraging recidivism." Report-Recommendation, 2003 WL 256774, at *12.

> FN26. The *Marcotte* court was not alone in relying on a deterrence rationale. *See Kincade*, 379 F.3d at 840 (Gould, J., concurring).
>
> FN27. As of November 22, 2005, the website was

currently available at http://criminal justice .state.ny.us/forensic /dnafaqs.htm.

Significant also are those provisions of the New York statute authorizing release of DNA records. The statute allows DNA records to be released only (1) to law-enforcement agencies "upon submission of a DNA record in connection with the investigation of the commission of one or more crimes or to assist in the recovery or identification of specified human remains"; or (2) for "criminal defense purposes," where a defendant seeks access to "samples and analyses performed in connection with the case." *Id.* § 995-c(6). [FN28] As the magistrate judge recognized, unless we think identification of human remains is the primary purpose of the statute (an unlikely prospect), the release provisions indicate that providing information to aid in investigations is the statute's immediate objective. *See* Report-Recommendation, 2003 WL 256774, at *11.

FN28. The statute also provides for release of DNA records for research and statistical purposes, but only "after personally identifiable information has been removed." *Id.* § 995-c(6)(c).

We therefore ask whether a DNA-indexing statute that aims to create a DNA-identification index to assist in solving crimes serves a special need, as that term has been defined by the Court in its recent cases. There can be little doubt that New York's statute serves a purpose related to law enforcement, but we do not think that fact automatically condemns the New York statute. In light of the distinction drawn by the Court in *Lidster* between "information-seeking" searches or seizures, which respond to "special law enforcement concerns," 540 U.S. at 424, 124 S. Ct. 885, and those regimes aimed at "detect[ing] evidence of ordinary criminal wrongdoing," *id.* at 423, 124 S. Ct. 885 (internal quotation marks omitted), we think a more nuanced approach to law-enforcement concerns is appropriate. *Lidster* instructs courts to examine carefully the type of law-enforcement concern served by a particular search or seizure regime. Like the magistrate judge, we find it crucial that the state, in collecting DNA samples, is not trying

to "determine that a particular individual has engaged in some specific wrongdoing." Report-Recommendation, **[669]** 2003 WL 256774, at *13. Although the DNA samples may eventually help law enforcement identify the perpetrator of a crime, at the time of collection, the samples "in fact provide no evidence in and of themselves of criminal wrongdoing," and are not sought "for the investigation of a specific crime." *Id.* (internal quotation marks omitted). Because the state's purpose in conducting DNA indexing is distinct from the ordinary "crime detection" activities associated with normal law-enforcement concerns, it meets the special-needs threshold. *See Green*, 354 F.3d at 678 ("Although the state's DNA testing of inmates is ultimately for a law enforcement goal, ... it is not undertaken for the investigation of a specific crime" (internal quotation marks omitted)); *Kimler*, 335 F.3d at 1146 ("[U]nder the special needs exception ... the desire to build a DNA database goes beyond the ordinary law enforcement need.").

B. Special-Needs Balancing Test

Having concluded that New York's DNA statute serves a special need, we now weigh that special need against the privacy intrusion it effects to determine whether it is reasonable within the meaning of the Fourth Amendment. *See O'Connor*, 480 U.S. at 725-26, 107 S. Ct. 1492; *see also Lidster*, 540 U.S. at 426-27, 124 S. Ct. 885. We conduct a "fact-specific balancing of the intrusion on the ... Fourth Amendment rights [of the persons searched] against the promotion of legitimate governmental interests." *Earls*, 536 U.S. at 830, 122 S. Ct. 2559; *see also Chandler*, 520 U.S. at 314, 117 S. Ct. 1295.

There can be little doubt that New York has a strong government interest in obtaining identifying information from convicted offenders and keeping a record of such information. *See, e.g., Sczubelek*, 402 F.3d at 185 ("The interest in accurate criminal investigations and prosecutions is a compelling interest that the DNA Act can reasonably be said to advance."); *Kincade*, 379 F.3d at 838-39 (finding that federal DNA statute serves "undeniably compelling" state interests in (1) identifying probationers who

commit crimes once they are at large, and (2) deterring recidivism); *Green*, 354 F.3d at 679 (finding that Wisconsin's DNA statute "serves an important state interest" in allowing law enforcement to collect "the most reliable evidence of identification"); *see also Earls*, 536 U.S. at 824, 122 S. Ct. 2559 (evaluating strength of government's interest as well as "efficacy" of program in serving that interest). Nor is there any question that New York's statute is effective in advancing that state interest.

Against these government interests, the court must weigh the intrusion on inmates, which is twofold. First, offenders are subject to a physical intrusion when they are required to provide the DNA sample, whether by blood sample or buccal cheek swab. We conclude that this physical intrusion is far outweighed by the government's strong interests in obtaining from plaintiffs the uniquely effective identifying information that DNA provides. The Supreme Court has long maintained that the intrusion effected by taking a blood sample, while subject to the Fourth Amendment, is minimal. *See Skinner*, 489 U.S. at 624, 109 S. Ct. 1402. In the prison context, where inmates are routinely subject to medical procedures, including blood draws, and where their expectation of bodily privacy, while intact, is diminished, see *Marcotte*, 193 F.3d at 78, the intrusiveness of a blood draw is even further minimized. [FN29]

> FN29. In this regard, we note that plaintiffs have submitted materials indicating that they were subject to blood tests when they first entered prison. *See* JA at 49 ("The taking of a DNA sample involves a similar procedure to the one that was used on you when you first entered the system and a blood sample was taken from your arm by medical personnel.").

[670] The second intrusion to which offenders are subject is the analysis and maintenance of their DNA information in New York's database. This intrusion may be viewed either as a search, *see Skinner*, 489 U.S. at 616-17, 109 S. Ct. 1402 (chemical analysis

of blood sample "to obtain physiological data" is a Fourth Amendment search), or as a seizure, *see id.* at 617 & n. 4, 109 S. Ct. 1402. Regardless, it is potentially a far greater intrusion than the initial extraction of DNA, since the state analyzes DNA for information and maintains DNA records indefinitely. It is this intrusion that has caused the greatest concern among those of our colleagues who would strike down DNA- indexing statutes as unconstitutional. *See Kincade*, 379 F.3d at 867 (Reinhardt, J., dissenting) (arguing that DNA indexing "constitutes far more of an intrusion than the mere insertion of a needle," since the samples are turned into "profiles capable of being searched time and time again throughout the course of an individual's life"); *id.* at 872 (Kozinski, J., dissenting) ("[I]f we accept the legal presumption ... that once [an offender] leaves supervised release he will be just like everyone else, authorizing the extraction of his DNA now to help solve crimes later is a huge end run around the Fourth Amendment."); *see also Sczubelek*, 402 F.3d at 201 (McKee, J., dissenting) ("In order to sustain the DNA search of Sczubelek, we must conclude that it is reasonable to catalogue his DNA even though he has committed no new crimes because of the possibility, however remote or theoretical, that he may one day commit another crime.").

Although we acknowledge these concerns, we ultimately conclude that the intrusion into plaintiffs' privacy resulting from state's practice of analyzing and maintaining DNA records does not outweigh the government's strong interests. Although DNA indexing has the potential to be broadly revealing, the New York statute as written does not provide for sensitive information to be analyzed or kept in its database. Rather, it provides only for the analysis of identifying markers. N.Y. Exec. Law § 995-c(3), (5). The junk DNA that is extracted has, at present, no known function, except to accurately and uniquely establish identity. Although science may someday be able to unearth much more information about us through our junk DNA, that capability does not yet exist, and, more importantly, the New York statute prohibits such analysis. *Id.* The law provides that DNA records "shall be confidential," *id.* § 995-d(1), and criminally punishes (1) the intentional disclosure of DNA records to unauthorized individuals or entities, (2) the

intentional use or receipt of DNA records for "purposes other than those authorized [by the statute]," and (3) knowingly tampering or attempting to tamper with any DNA sample or the collection container without lawful authority, *id.* § 995-f; 1999 N.Y. Laws, ch. 560, § 6 (amending the statute to include anti-tampering provision). [FN30] Although plaintiffs and amici suggest that New York's statute could permit the state to use DNA for more harmful purposes than maintaining an identification database, those facts are not present here, and if they should arise, no doubt a different **[671]** calculus under the special-needs analysis would result.

> FN30. These offenses, previously misdemeanors, were made class E felonies in 1999. 1999 N.Y. Laws, ch. 560, § 5.

Given the limits imposed on the collection, analysis, and use of DNA information by the statute, we see the intrusion on privacy effected by the statute as similar to the intrusion wrought by the maintenance of fingerprint records. [FN31] *See Kincade*, 379 F.3d at 836 n. 31 (noting that "everyday 'booking' procedures routinely require even the merely accused to provide fingerprint identification, regardless of whether investigation of the crime involves fingerprint evidence" (internal quotation marks omitted)); *Green*, 354 F.3d at 680 (Easterbrook, J., concurring) ("Collecting felons' DNA, like collecting their fingerprints, handwriting exemplars, and other information that may help solve future crimes (and thus improve the deterrent force of the criminal sanction) is rationally related to the criminal conviction."); *cf. Sczubelek*, 402 F.3d at 185 ("Individuals on supervised release cannot reasonably expect to keep information bearing on their physical identity from government records."). The collection and maintenance of DNA information, while effected through relatively more intrusive procedures such as blood draws or buccal cheek swabs, in our view plays the same role as fingerprinting. Given that the state likely already has a plethora of identifying information about plaintiffs, in light of their status as convicted felons, *see* Report-Recommendation, 2003 WL 256774, at *16, the additional intrusion effected by the DNA statute is insufficient to outweigh the state's strong interest in maintaining a

DNA index. [FN32] In other words, plaintiffs' status as convicted felons renders minimal the degree to which the New York statute intrudes on their privacy.

> FN31. The analogy we draw here between fingerprinting and DNA indexing is not inconsistent with our conclusion, in Part I, *supra*, that the two practices are dissimilar for purposes of determining whether the Fourth Amendment is implicated. We disagreed above, in light of *Dionisio* and *Skinner*, with the district court's suggestion that the physical intrusion caused by drawing blood could be considered identical to the state's practice of taking fingerprints. That conclusion, however,
> does not preclude us from finding that the state's purpose in keeping DNA records is comparable to the state's purpose in keeping fingerprints and photographs.

> FN32. Thus, even though some plaintiffs are no longer prisoners, and may thus claim a greater expectation of privacy than they held while incarcerated, we still find that--in light of the fact that the state regularly maintains identifying records of former inmates--the privacy intrusion remains relatively minimal.

We therefore conclude that New York's statute, which serves a special need beyond the normal need for law enforcement, is supported by strong government interests that outweigh the relatively minimal intrusion on plaintiffs' expectation of privacy. Moreover, we reject plaintiffs' argument that the state should be required to obtain a warrant before taking DNA samples. *T.L.O.*, 469 U.S. at 351, 105 S. Ct. 733 (Blackmun, J., concurring) (noting that state must generally show that obtaining a warrant would be "impracticable" when it conducts warrantless search under the special-needs exception). Obtaining a warrant requires probable cause, *see, e.g., Mincey*, 437 U.S. at 390, 98 S. Ct. 2408, which obviously does not

exist in the context of suspicionless searches; requiring a warrant from law enforcement would thus plainly be "impracticable." The usual purpose of obtaining a warrant--to permit the state to engage in the normal law-enforcement function of crime investigation--is absent in the context of an information-gathering search. And the concerns that usually animate the warrant requirement--that the state will exercise its search and seizure powers arbitrarily, **[672]** *see Skinner*, 489 U.S. at 622, 109 S. Ct. 1402--are not at play in the case of DNA-indexing statutes, which take a blanket approach and apply to all convicted offenders falling within certain categories. We further note that in applying the special-needs exception in other cases, the Supreme Court has not always required an express finding that obtaining a warrant would be impracticable. *See, e.g., Lidster*, 540 U.S. at 427-28, 124 S. Ct. 885; *Earls*, 536 U.S. at 829-37, 122 S. Ct. 2559.

Relying on the special-needs test rather than the general balancing test employed by the district court, we hold that New York's DNA statute satisfies the Fourth Amendment. Accordingly, the district court properly granted defendants' motion to dismiss.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

LEVAL, Circuit Judge, concurring.

I concur in the majority's rejection of this challenge, brought by New York State prisoners convicted of felony offenses, to the taking of their DNA to assist in solving and prosecuting crimes. See N.Y. Exec. Law § 995 et seq. (McKinney, 1999). I write separately because I believe a few more words are in order to explain the somewhat confusing relationship among the various precedents of the Supreme Court. In my view, the model for analysis of the question is provided by *Illinois v. Lidster*, 540 U.S. 419, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004), the Supreme Court's most recent confrontation of the issue.

I begin with *Griffin v. Wisconsin*, 483 U.S. 868, 107 S. Ct. 3164, 97 L. Ed. 2d 709, in which the Supreme Court in 1987 upheld a Wisconsin law validating warrantless searches of probationers, seeking evidence that the probationers had committed new violations of law. *Id.* at 873, 107 S. Ct. 3164. The Court explained that "[a] State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, ... presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." *Id.* at 873-74, 107 S. Ct. 3164.

Then, in *Indianapolis v. Edmond*, 531 U.S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000), and *Ferguson v. City of Charleston*, 532 U.S. 67, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001), the Supreme Court struck down a highway checkpoint program designed to discover and interdict narcotics, and a public hospital's program to screen urine samples of nonconsenting pregnant patients for the purpose of prosecuting pregnant drug users for endangering their unborn children. In these two cases, the Court asserted a broad rule that searches or seizures without a warrant or individualized suspicion were presumptively unconstitutional unless the primary purpose was "to serve special needs, beyond the normal need for law enforcement." *Edmond*, 531 U.S. at 37, 121 S.Ct. 447 (internal quotation marks omitted). In *Ferguson*, the Court explained the different result reached in *Griffin* on grounds of the reduced expectation of privacy held by persons on probation as a consequence of a criminal conviction. *See Ferguson*, 532 U.S. at 81 n. 15, 121 S. Ct. 1281 ("*Griffin* is properly read as limited by the fact that probationers have a lesser expectation of privacy than the public at large."). On a literal reading of *Edmond* and *Ferguson*, the broad declared rule of presumptive unconstitutionality appeared to bar any search or seizure without warrant or individualized suspicion unless its primary purpose was "beyond the normal need for law enforcement." *Edmond*, 531 U.S. at **[673]** 37, 121 S. Ct. 447 (internal quotation marks omitted) (emphasis added); *see also Ferguson*, 532 U.S. at 79, 121 S. Ct. 1281 (defining a valid "special need" as "one divorced from the State's general interest in law enforcement"). In an extended footnote and elsewhere, *Ferguson*

cast doubt on whether a warrantless, suspicionless search intended to gather evidence for criminal prosecution could ever escape presumptive unconstitutionality. *See Ferguson*, 532 U.S. 67, 81 n. 15, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (questioning "whether 'routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature of the ... program' ") (*quoting Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 621, n. 5, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989)); *see also Ferguson*, 532 U.S. at 82-83 & n. 20, 121 S. Ct. 1281.

Were *Edmond* and *Ferguson* the last word on the matter, it would be difficult to reconcile approval of the New York DNA Statute, whose purpose is to collect identifying evidence for use in criminal prosecution, with the broad rule of presumptive unconstitutionality announced in those cases. More recently, however, in *Illinois v. Lidster*, the Supreme Court signaled a departure from the rigidity of the *Edmond/Ferguson* proposition. *Lidster* upheld a programmatic seizure [FN1] without warrant or individualized suspicion, done for the law-enforcement purpose of seeking information identifying the perpetrator of an unsolved crime.

> FN1. While *Lidster* concerned a seizure rather than a search, the two can be closely analogized and are both subject to the same provisions of the Fourth Amendment. The New York DNA Statute seems to involve both a search and a seizure. In any event, there appears to be no difference for these purposes in the Fourth Amendment standards as between searches and seizures.

The seizure in *Lidster* was a roadblock stopping motorists to ask for information regarding a hit-and-run-accident which resulted in the death of a cyclist. *Lidster*, 540 U.S. at 422, 124 S. Ct. 885. The Court determined that the seizure was not presumptively unconstitutional, notwithstanding the absence of a warrant or individualized suspicion and that it had a law-enforcement purpose of seeking information identifying the perpetrator of a crime. Instead

of applying the *Edmond/Ferguson* rule of presumptive unconstitutionality to the *Lidster* facts, the Supreme Court instead determined to test the constitutionality of the *Lidster* seizure on the basis of a test of reasonableness. *Id.* at 426, 124 S. Ct. 885.

Following *Lidster*, the question remains when a search or seizure for law-enforcement purposes without warrant or individualized suspicion will be judged under the strict *Edmond/Ferguson* test, and when it will be judged under the more permissive reasonableness test found to apply in *Lidster*. While *Lidster* refrained from laying out explicit standards, the mode of analysis followed by the Supreme Court provides a guide to assess the justification of New York's DNA screening of the convicted prisoners who bring this challenge. *Lidster* indicates that before striking down a search or seizure not supported by a warrant or individualized suspicion, the Court should undertake an examination of all the circumstances in light of Fourth Amendment concerns and norms to determine whether departure from the rule of presumptive unconstitutionality is appropriate. If the Court finds that the circumstances do not call for rigid application of the requirement of a warrant or individualized suspicion, the Court must then consider the reasonableness of the search or **[674]** seizure to determine whether it satisfies the Fourth Amendment.

Lidster began by cautioning against reading the earlier, broadly restrictive language too literally.

> We concede that *Edmond* describes the law enforcement objective there in question as a "general interest in crime control," but it specifies that the phrase "general interest in crime control" does not refer to every "law enforcement" objective. We must read this and related general language in *Edmond* as we often read general language in judicial opinions--as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then

considering.

Lidster, 540 U.S. at 424, 124 S. Ct. 885 (internal citations omitted) (*quoting Edmond*, 531 U.S. at 44 n. 1, 121 S. Ct. 447).

The Court then undertook a broad examination of all the circumstances in light of Fourth Amendment objectives to determine whether it was reasonable and appropriate, notwithstanding the law-enforcement purpose, to depart in those circumstances from the presumption of unconstitutionality asserted in *Edmond* and *Ferguson*. The Court rejected the application of the rigid rule of presumed unconstitutionality to the circumstances in favor of a test based on reasonableness. The factors which led the Court to reject the applicability of the more rigid rule of *Edmond/Ferguson* were the following.

First, the checkpoint stop differed significantly from the conventional model of search/seizure for law enforcement, which is generally directed against persons believed to be complicit in the crime. The police in *Lidster* were stopping all cars for a brief, polite inquiry, to ask motorists "for their help in providing information about a crime in all likelihood committed by others." *Id.* at 423, 124 S. Ct. 885. Thus, the persons being stopped were not stopped because of any belief, as in the conventional case of search or seizure motivated by law enforcement objectives, that they might have been involved in the crime. Second, in view of the fact just mentioned, it would make no sense to require a warrant or individualized suspicion as the persons being stopped were not suspected of any unlawful conduct; such a requirement would have defeated the information-seeking objective of the traffic stop. *See id.* at 424, 124 S. Ct. 885 ("[U]nlike *Edmond*, the context here (seeking information from the public) is one in which, by definition, the concept of individualized suspicion has little role to play."). Third, the Court found that the privacy interest ordinarily protected by the warrant/probable cause requirement was diminished. This was so because the persons detained were in automobiles on the highway--circumstances as to which it is well established that expectations of privacy are reduced. *See id.* ("The Fourth

Amendment does not treat a motorist's car as his castle."); *see also New York v. Class*, 475 U.S. 106, 112-13, 106 S. Ct. 960, 89 L. Ed. 2d 81 (1986); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 450-52, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990). Fourth, the extent of the intrusion on privacy was not great, consisting of a brief interruption of a car ride for a police officer's inquiry whether anyone might volunteer information. *Lidster*, 540 U.S. at 425, 124 S. Ct. 885. Fifth, the Court found that the State's motivating objective--to seek information concerning the hit-and-run accident which killed a bicyclist--was a suitable, important State objective. [FN2] *Id.* at 427, 124 S. Ct. 885. Finally, **[675]** the Court did not believe that assessing such stops under a standard of reasonableness, rather than a presumptive rule of unconstitutionality, would cause an unreasonable proliferation of such stops to the detriment of the citizenry. *Id.* at 426, 124 S. Ct. 885.

> FN2. I recognize that the discussion in *Lidster* of the gravity of the State's objective was in the portion of the opinion discussing the reasonableness of the stop, after the determination that the presumptive rule of unconstitutionality was not applicable. *Lidster*, 540 U.S. at 427, 124 S.Ct. 885. It nonetheless seems clear from the tenor of the Court's discussion that an evaluation of the importance of the State's interest plays a role in the determination whether the rule of presumed unconstitutionality should apply. An important State objective better supports departure from the presumptive rule of unconstitutionality than an insignificant or frivolous State objective. It would be perverse to interpret the Supreme Court's opinion otherwise.

In sum, the Court concluded, having examined the pertinent circumstances with reference to the Fourth Amendment's concerns, that it was appropriate for the constitutionality of that seizure to be evaluated on a basis of reasonableness, rather than under a presumption of unconstitutionality.

We face essentially the same type of question as in *Lidster*--whether this programmatic search, the taking of blood samples from New York State prisoners serving felony sentences in order to provide evidence solving future criminal cases--is subject to the customary blanket presumption of unconstitutionality for warrantless, suspicionless searches conducted for law-enforcement purposes. It is my understanding that we should approach the question as the Court did in *Lidster*--by examining all the surrounding circumstances to determine whether it is appropriate in Fourth Amendment terms to reject that presumption of unconstitutionality in favor of a test of reasonableness.

Examination of all the circumstances in light of the concerns of the Fourth Amendment supports the conclusion that the *Edmond/Ferguson* presumption of unconstitutionality has no appropriate role here. First, this search differs substantially from the usual law-enforcement circumstance where the search is motivated by information connecting the person or place searched with a particular known and unsolved crime. What is involved is the establishment of a database, akin to a fingerprint database, to assist in the future solution of crimes. The search is not motivated by suspicion that the person being searched was involved in any unsolved crime. Second, for the reason just given, rigid adherence to a requirement of a warrant and/or individualized suspicion would be incompatible with the success of the governmental objective. It would be impossible to establish such a database of important law-enforcement information enabling identification of the perpetrators of rapes, murders, and other violent crimes, if the data concerning any individual could not be obtained until the authorities possessed information supporting a reasonable suspicion of his involvement in the crime.

Third, the challenge was brought by prisoners serving felony terms, who do not enjoy the same full rights of privacy as the public at large. The administrative and penalogical concerns of operating a prison system inevitably result in a major diminution of the prisoners' privacy interest. Prisoners are routinely subject to searches of their persons and their cells without warrant, suspicion,

or notice. *See Hudson v. Palmer*, 468 U.S. 517, 526, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984) (holding that the Fourth Amendment proscription against unreasonable searches does not apply **[676]** within the confines of the prison cell); *Bell v. Wolfish*, 441 U.S. 520, 558, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (holding that routine body cavity searches of prisoners conducted after contact visits with outside persons do not violate the Fourth Amendment). Furthermore, as DNA is identifying information, it is particularly noteworthy that prisoners' right to privacy with respect to their identifying information is extremely reduced. Their names, photographs, fingerprints, descriptions, and other identifying information are mandatorily taken and are placed in databases that become available to law enforcement throughout the nation, if not the world.

I do not mean to imply by this latter point that the Fourth Amendment offers no protection to convicted prisoners. The point is less extreme. It is merely that the privacy interest they enjoy is less broad than that of the ordinary person. As noted above, in *Ferguson*, the Supreme Court justified *Griffin*'s toleration of a warrantless, suspicionless, routine search of probationers, conducted for the purpose of collecting information for law-enforcement purposes, on the ground that "probationers have a lesser expectation of privacy than the public at large." *Ferguson*, 532 U.S. at 81 n. 15, 121 S. Ct. 1281. If that is true for probationers, it is so a fortiori for prisoners serving felony sentences. Similarly, one of the factors that led the Supreme Court to approve the warrantless, suspicionless seizure for law-enforcement purposes in *Lidster* was the fact that while people are in automobiles on the highway, the scope of their Fourth Amendment protection is diminished. *Lidster*, 540 U.S. at 424, 124 S. Ct. 885 ("The Fourth Amendment does not treat a motorist's car as his castle .... And special law enforcement concerns will sometimes justify highway stops without individualized suspicion."). Once again, to the extent that the diminished privacy expectations of persons in a car on the highway played a role in justifying the rejection of the rigid presumption of unconstitutionality for a law-enforcement motivated seizure in *Lidster*, the diminished privacy expectations of the felony prisoners is an a fortiori case.

Fourth, the extent of intrusion occasioned by this search is not great, either in terms of the inconvenience inflicted on the prisoner or the degree of intrusion into private matters. This factor is slightly more favorable to the parties objecting than was true in *Lidster*, where the only inconvenience inflicted was a brief traffic stop, and the only information sought was on a volunteered basis without direct questioning. Here, the subject prisoners have no choice whether to yield the information, and the procedure (at least in the cases of these plaintiffs) involved piercing the skin to draw a blood sample. The drawing of such a blood sample is, nonetheless, quite a minor intrusion, of the sort that ordinary citizens voluntarily submit to routinely for medical purposes. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 625, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989) ("[T]he intrusion occasioned by a blood test is not significant, since such tests are commonplace in these days of periodic physical examinations and experience with them teaches us that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain." (internal quotation marks omitted)). Furthermore, the information being exacted from the test consists of nothing more than identifying information, akin to the fingerprint and identifying photograph which are routinely taken from prisoners. The blood sampling mandated by the statute is not being used to detect diseases, substances ingested, or anything revelatory of the prisoner's conduct.

[677] Finally, the State objective is useful and valuable. For a very long time, law-enforcement authorities both state and federal have built up and maintained criminal identification files, consisting of fingerprint data and identifying photographs for use in solving crimes in the future. DNA statutes bring such crime databases up to date with contemporary (and infinitely more reliable) scientific methods of identification. The establishment of such databases not only increases the likelihood of identifying the perpetrators of violent offenses, but, as a very important corollary, reduces the likelihood of mistaken conviction of innocent persons. The importance of the objective, and the impossibility of achieving it if a warrant is required, surely tends to support rejection of the role of presumptive unconstitutionality. Nor would rejection of a rule of presumptive

unconstitutionality lead to proliferation of such procedures to the detriment of the citizenry. The challenge considered here is brought by prisoners convicted of a felony, and their status as such plays a significant role in the reasoning justifying the search. A ruling exempting this search from the *Edmond/Ferguson* presumption of unconstitutionality would not result in a proliferation of mandatory DNA sampling of the public-at-large.

All of the factors pertinent to the goals of the Fourth Amendment favor rejection of the *Edmond/Ferguson* presumption of unconstitutionality. The conventional rule of presumptive unconstitutionality for law-enforcement-motivated searches not supported by a warrant or individualized suspicion should accordingly have no application here.

It does not necessarily follow that the search "is automatically, or even presumptively, constitutional." *Lidster*, 540 U.S. at 426, 124 S. Ct. 885.

> It simply means that we must judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances.... [I]n judging reasonableness, we look to the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.

Id. at 426-27, 124 S. Ct. 885 (internal quotation marks omitted).

There is no difficulty concluding that the challenged searches conducted under the DNA Statute are reasonable and consistent with the Fourth Amendment. It is unnecessary for me to go through the factors that made the challenged searches reasonable. Such a discussion would largely duplicate what was said in the majority opinion and in the foregoing discussion explaining the rejection of the *Edmond/Ferguson* presumption of unconstitutionality.

In sum, I understand the teaching of *Lidster* as follows.

When confronting a challenge to a law-enforcement motivated search or seizure not supported by a warrant or individualized suspicion, before striking it down on the basis of presumed unconstitutionality, the court should undertake, as in *Lidster*, an examination of all the circumstances to determine whether in light of Fourth Amendment concerns and norms it is appropriate to reject the *Edmond/ Ferguson* rule of presumed unconstitutionality. If the court finds that the circumstances do not call for rigid application of the requirement of a warrant or individualized suspicion, the court would go on to consider the reasonableness of the pertinent search to determine whether it withstands the challenge on the basis of the Fourth Amendment.

LYNCH, District Judge, concurring.

I fully join in Chief Judge Walker's thorough opinion for the court. Though reluctant **[678]** to burden the record with still more writing, I add just a few words.

The genius of the common-law system of adjudication is that the decisions of courts constitute precedent, not the opinions by which courts attempt to explain those decisions. This principle does not excuse courts from giving the best reasoning they can to explain their outcomes, nor does it refute the insight that if a result cannot be adequately explained, it is probably wrong. Yet sometimes the consistent results of repeated judicial encounters with the same problem are more reliable than the analyses in the resulting opinions. This is particularly so when lower courts reify the "doctrines" or methodologies adopted by the Supreme Court in answering difficult questions of law.

This may be one of those situations. I am wholly confident in the correctness of the unanimous conclusion of the federal appellate courts upholding mandatory DNA sampling of convicted prisoners against Fourth Amendment challenges. I am less confident that either the "special needs" or "reasonableness" approaches that have divided the courts quite capture the reasons for this result.

Starting from the basics: the Fourth Amendment's text outlaws "unreasonable" searches and seizures. U.S. Const. amend. IV. It follows then that the ultimate question in assessing the constitutionality of searches and seizures is whether they are "reasonable." However, the text of the Amendment also references "warrants" and "probable cause," and while the text does not quite so command, the Supreme Court has long interpreted the Amendment as presumptively requiring, in the typical search scenario, a warrant supported by probable cause. *See Henry v. United States*, 361 U.S. 98, 100, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959) (noting that "it is the command of the Fourth Amendment that no warrants for either searches or arrests shall issue except upon probable cause" and that "[t]he requirement of probable cause has roots that are deep in our history"). Warrantless searches are, in theory, presumptively unreasonable, though a great many exceptions permit warrantless searches where the circumstances are sufficiently exigent to rebut the presumption and establish reasonableness. *United States v. Medina*, 944 F.2d 60, 68 (2d Cir. 1991); *see, e.g., United States v. Robinson*, 414 U.S. 218, 236, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973) (holding that a full search of a person incident to "full custody arrest" may be undertaken); *Draper v. United States*, 358 U.S. 307, 310-11, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959) (finding that warrantless search and seizure subsequent to arrest had probable cause and reasonable grounds, and was thus allowed). Other searches are permissible even in the absence of probable cause, especially outside the "typical" context of searches by law-enforcement officers for contraband or for evidence of crime. *See, e.g., Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990) (determining that a sobriety checkpoint aimed at removing drunk drivers from the road was constitutional); *New York v. Burger*, 482 U.S. 691, 702, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987) (holding that warrantless administrative inspections of a closely regulated business fell within the warrant requirement exception). [FN1]

FN1. For a more comprehensive overview of permissible searches without probable cause, *see supra* pages 660 - 661.

I think it is reasonably clear what the warrant and probable-cause requirements **[679]** of the Fourth Amendment are trying to prevent. Just as, under the Fifth Amendment, Americans are not required to explain or justify themselves to the authorities or prove their innocence of crime, they are not required to surrender their privacy to demonstrate that they are not guilty of carrying contraband, or to display their possessions to assure the authorities that they are not holding evidence of their guilt. Rather, it is only when the authorities have good reason to believe that evidence will be found (the probable cause requirement), ideally demonstrated in advance to a judicial officer (the warrant requirement), that the citizen's privacy can be invaded.

Experience has shown the wisdom of this approach. Categorical rules are helpful because an unbounded ad hoc judgment of the "reasonableness" of governmental action will often tempt judges to uphold actions that, particularly with the benefit of hindsight, prove valuable in accomplishing social goals. The Supreme Court has thus been wary of any ad hoc "reasonableness" review, lest these standards be whittled away even further by conclusions that in various circumstances it is "reasonable" to permit precisely what the Amendment seeks to prohibit. *See Oliver v. United States*, 466 U.S. 170, 181, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984) ("Th[e] [Supreme] Court repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to differing factual circumstances.")

One categorical rule that the Court has used to permit warrantless searches that seem "reasonable," or even searches without probable cause, is to define those searches as being justified by "special needs" of the Government. *City of Indianapolis v. Edmond*, 531 U.S. 32, 37, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000). However, this formulation too is subject to abuse. A "special need" can be found as easily as the "reasonableness" of a governmental action, whenever it appears that compliance with the normal restraint on governmental searches is inconvenient or poses an obstacle to the legitimate goals of fighting crime. Accordingly, the Court has mostly

upheld government searches under the "special needs" rubric where the principal "need" is not connected to law enforcement, and has even suggested that a special need must be something "other than crime detection." *Chandler v. Miller*, 520 U.S. 305, 314, 117 S. Ct. 1295, 137 L. Ed. 2d 513 (1997). Like the reluctance to descend into ad hoc judgments of "reasonableness," the Court's limitation of the "special needs" doctrine is based on the need to maintain the ordinary standards for ordinary searches.

Nevertheless, drawing the line between crime control and civil governmental purposes, let alone a distinction between "ordinary law-enforcement needs" and "special" crime-control objectives, is difficult. Thus, the line is thin between law enforcement's looking for drunk drivers to protect the public, and looking for evidence of drunk driving to support a criminal prosecution.

Here, the obstacle to a "special needs" interpretation is that the only substantial reason to collect DNA samples from convicts is, in the broad sense, to enforce the criminal law and to obtain evidence that may one day be useful in solving past or future crimes. Thus, if "special needs" analysis is precluded whenever an intrusion into privacy serves a law enforcement rationale, the "special needs" doctrine could not apply here.

It seems to me that the "special needs" and "reasonableness" tests are both efforts to accomplish the same goal. "Reasonableness," the ultimate standard under the **[680]** Fourth Amendment, is not the usual way of evaluating a search because we have some clear and sensible rules for evaluating ordinary searches and seizures which do not ordinarily allow judges simply to declare a search reasonable when those rules have not been followed. However, in certain circumstances, those rules do not appear to apply--not because the rules are inconvenient to follow, but because in such situations, the rules are not needed to prevent the mischief that they are designed to prevent. It is in those circumstances--circumstances of "special needs," if you will--that a more general standard of reasonableness is applied.

Without question, a blood test, and even a less intrusive cheek swab, for purposes of obtaining a DNA sample is a "search." *Skinner v. Ry. Labor Executives Ass'n*, 489 U.S. 602, 616, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989); *Schmerber v. California*, 384 U.S. 757, 767, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). If the police are trying to identify the perpetrator of a crime, they could not, consistent with the guarantees of the Fourth Amendment, require everyone in the neighborhood to submit to such procedures. Probable cause and a warrant would be required because to require less would be to require citizens to surrender their privacy to prove their innocence, rather than requiring the authorities to justify invading privacy by showing a good reason to believe that the citizen harbored evidence of a crime. Deciding whether probable cause exists no doubt is very close to deciding whether, on the given facts, it is "reasonable" to conduct the search. Still, the requirement of probable cause channels the inquiry to the strength of the evidence, and away from a generalized assessment of whether, on balance, it might not be a good thing to conduct the search. That might well be so even in a prison context: just because prisoners enjoy, in many respects, a lesser expectation of privacy than ordinary because of the very nature of imprisonment, does not necessarily mean that dragnet blood tests would be permitted simply because the "neighborhood" where the crime was committed is a prison.

However, New York's statute, like those of every other state in the union, does not controvert these principles. It does not seek evidence to solve a particular crime, nor does it require prisoners to exonerate themselves by providing evidence that the state has no good reason to think will be there. Instead, New York requires all those who are convicted of certain crimes to provide information to be retained in a data base. *See* N.Y. Exec. Law § 995 et seq. (McKinney 1999). Having to provide such identifying information in the context of the criminal justice system is not at all unheard of. Although arrested persons may not ordinarily be interrogated without being given Miranda warnings, questions aimed at eliciting identifying or "pedigree" information is permitted without warnings, even though the answers to such questions may become evidence either of the particular crime for which the suspect was arrested, or

of some past or future crime not yet under investigation. *Pennsylvania v. Muniz*, 496 U.S. 582, 590, 110 S. Ct. 2638, 110 L. Ed. 2d 528 (1990); *Rosa v. McCray*, 396 F.3d 210, 221 (2d Cir. 2005). The purpose is "law enforcement," but it is not the usual purpose of interrogation. Similarly, fingerprints may be forcibly taken from arrested persons, though this too is beyond the power of the police with respect to ordinary citizens, whose prints may only be obtained by a grand jury. *See United States v. Dionisio*, 410 U.S. 1, 3-4, 93 S. Ct. 764, 35 L. Ed. 2d 67 (1973) (stating that fingerprints may be compelled by a grand jury).

It seems to me, therefore, that the question here is not the usual one that governs **[681]** searches and seizures--i.e., has the government adequately justified utilizing an investigative method that invades privacy by showing that there is good reason to believe that evidence of crime will be found? Rather, it is whether the government has adequately justified requiring prisoners, who have been convicted of crime, to surrender information that is being sought not to solve a crime, but rather to maintain a data bank of information about people who have committed crimes in the past. Thus, while a blood test or cheek swab is, in the abstract, a "search," when carried out under these circumstances, the search does not implicate the concerns that motivate the Fourth Amendment's usual rules and presumptions. It is for that reason that I am content to call this a "special need," even though its purpose relates to the enforcement of the criminal law, and even though the context is somewhat distinct from the sorts of situations in which the Supreme Court has applied that term.

Application of that standard opens the door to a balancing test. It is noteworthy that the bulk of the court's opinion is devoted to explicating the relevant Supreme Court doctrines, developed in cases that are quite unlike this one, in order to decide what test to apply. With that resolved, it takes far fewer pages to conclude that the statute passes. Similarly, the split among appellate courts is over methodology, not ultimate conclusions. Although some judges have dissented, no court of appeals has invalidated a statute of this kind. I believe that the court's opinion offers a correct analysis, and I fully

join it. I am even more confident, however, of the correctness of the decision we reach, which is consistent with the judgment of the legislatures of every state in the Union, [FN2] and of every court of appeals that has addressed the issue.

FN2. For an overview of each state's DNA database laws, *see* Legislation & State Statutes, http://www.dnaresource .com/bill_ tracking_ list .htm (last visited Nov. 22, 2005).

APPENDIX B

United States Court of Appeals,
Second Circuit.

Jason B. NICHOLAS, John Lewis, Philip Rabenbauer, Frank Solimine, Robert Pacini, Chester Flanders, Bennie Bates, Lymond Stephenson, Luis Mejia, Cecil Barrow, Dominic Deruggiero, Plaintiffs-Appellants,

Alvaro Sanchez, Plaintiff,

v.

Glenn S. GOORD, New York State Department of Correctional Services; Katherine Lapp, New York State Division of Criminal Justice Services; Medilabs, Inc.; Jessica Walsh, Defendants-Appellees.

No. 04-3887-PR.

Decided: April 26, 2006

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Jason B. Nicholas. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk
By: s/Tracy W. Young
Motion Staff Attorney

APPENDIX C

United States District Court,
Southern District of New York

Jason B. NICHOLAS; John Lewis; Philip Rabenbauer; Frank Solimine; Robert Pacini; Chester Flanders; Bennie Bates; Lymond Stephenson; Alvaro Sanchez; Luis Mejia; Cecil Barrow; Dominic Deruggiero, Plaintiffs,

v.

Glenn GOORD, Commissioner, New York State Department of Corrections; Katherine Lapp, Director, New York State Division of Criminal Justice Services; Medilabs, Inc.; Jessica Walsh, Medical Technician, Defendants.

No. 01 Civ. 7891(RCC)(GWG).

June 24, 2004.

MEMORANDUM AND ORDER

[Page numbering from 2004 WL 1432533 in bold]

DUFFY, J.

[1] This case involves a Fourth Amendment challenge to a New York State statute requiring certain convicted felons to submit samples of Deoxyribonucleic Acid ("DNA") for inclusion in a DNA database. The matter was submitted to Magistrate Judge Gorenstein who, on February 6, 2003, recommended dismissal of plaintiffs' complaint. *See Nicholas v. Goord*, 2003 WL 256774, * 1 (S.D.N.Y. 2003). Plaintiffs have now filed objections arguing that the Magistrate Judge misinterpreted and misapplied relevant Supreme Court precedent regarding the constitutionality of warrantless and suspicionless searches. Having reviewed de novo the entire record and report, *Grassia v. Scully*, 892 F.2d 16, 19 (2d Cir. 1989), I agree with the Magistrate Judge's conclusion though not his reasoning.

BACKGROUND

The importance of DNA in identifying a person cannot be understated. Except for identical twins, no two individuals share the same DNA. *See* Thomas M. Flemming, Annotation, Admissibility of DNA Identification Evidence, 84 A.L.R. 4th 313 at § 2[b] (1991). What is more, an individual's DNA is the same in every nucleated cell of the body and remains the same throughout life. *Id.* Through DNA analysis, then, it is possible to identify a person "to the practical exclusion of all others." *Id.* In the criminal context, this means that DNA can exonerate an individual but more importantly, link a suspect to a crime where biological evidence has been left. *Id.* at § 2[a]. In short, DNA can serve both to identify an individual and as a powerful crime-solving tool.

It is not surprising, then, that all fifty states as well as the federal government have enacted statutes requiring the establishment and maintenance of a DNA databank. *See* Robyn C. Miller, Annotation, Validity, Construction, and Operation of State DNA Database Statutes, 76 A.L.R. 5th 239 at § 2[b] (2000). Although differing in some details, generally these statutes require the extraction and indexing of DNA taken from individuals convicted of certain felonies. [FN1]

> FN1. Often DNA is taken from a blood sample. It can also be taken, however, from a saliva sample or swab from the inside of the mouth. Miller, 76 A.L.R. 5th 239 at § 2[b].

Plaintiffs in this case are either current or former incarcerated felons subject to New York's DNA indexing law. [FN2] Three have yet to submit their DNA while the remaining plaintiffs have had blood taken and seek to have the results expunged. *Goord*, 2003 WL 256774 at *2. Essentially, plaintiffs' complaint makes one claim; that New York's statute violates their Fourth Amendment right to be free from unreasonable searches and seizures.

> FN2. Those plaintiffs currently released on parole had their blood drawn, typed, and indexed while still incarcerated. For a discussion of the details of New

York's indexing law, *see Goord*, 2003 WL 256774 at *1-2.

In holding the DNA statute constitutional and granting defendants' motion to dismiss, the Magistrate Judge first held that the taking of the DNA constituted a Fourth Amendment search. *Goord*, 2003 WL 256774 at *3. Then applying the special needs doctrine, he analyzed whether the search was reasonable. Finding that the statute served a special need, the Magistrate Judge balanced the interests at stake and found the search to be reasonable. *Id.* at *15, 19 (S.D.N.Y. 2003). Although I agree with the Magistrate Judge's ultimate conclusion, I disagree with using the special needs test to analyze the statute's constitutionality.

ANALYSIS

[2] The Fourth Amendment guarantees the "right of people to be secure ... against unreasonable searches and seizures." U.S. Const. amend IV. Relying on *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989), the Magistrate Judge held that drawing blood and typing it for DNA constitutes a search. [FN3] Defendant does not contest this. I am not necessarily convinced that the Magistrate Judge was correct to so quickly dismiss the question of whether the Fourth Amendment even applies here. [FN4] But given the failure of defendant to brief this issue and considering that courts addressing similar DNA statutes have found (or at least assumed) that the Fourth Amendment does apply, I will assume for purposes of the motion, that a search was conducted.

FN3. *Skinner* held that in light of society's concern for the security of one's person, penetrating beneath the skin to draw blood and analyzing it for physiological data, infringes upon a reasonable expectation of privacy. 489 U.S. at 616.

FN4. To my understanding, before there is a "search" one must have a reasonable expectation of privacy over the thing being acquired by the

government officials. No one would claim that the collection of skin flaked off by the body would constitute a search--even though such would contain DNA. Nor would the review of what has been dumped into the garbage be considered a search. *California v. Greenwood*, 486 U.S. 35, 40-41 (1988). In both examples, there is no expectation of privacy. Unlike in *Skinner*, we are dealing with incarcerated felons who, by virtue of their imprisonment, already have significantly reduced expectations of privacy. *See Hudson v. Palmer*, 468 U.S. 517, 526 (1984) (holding that prisoners do not have a reasonable expectation of privacy within their cells). Even a prisoner's right to bodily privacy is limited. *Covino v. Patrisi*, 967 F.2d 73, 78 (2nd Cir. 1992) (holding that prisoners have a limited right to bodily privacy); *United States v. Gonzalez*, 2000 WL 1721171, *3 (S.D.N.Y. 2000) (holding that defendant did not have a reasonable expectation of privacy in having guards view and photograph his body following the stabbing of a cell mate). Arguably, then, prisoners may not have a reasonable expectation of privacy with regard to blood tests especially considering they are already subjected to such tests as part of routine physical examinations. As to their claim of privacy in their DNA, plaintiffs' expectation of privacy is even weaker. If anything, analyzing blood for DNA is like fingerprinting. Neither DNA nor fingerprints involve a probing into a person's private life or thoughts typically associated with a search; both are physical characteristics which are constantly exposed to the public; and both serve to further the legitimate state interest in identifying those lawfully in custody. And although the Supreme Court has not specifically held as much, several of its cases suggest that by itself, fingerprinting is not a search. *See Davis v. Mississippi*, 394 U.S. 721, 727-28

(1969); *Hayes v. Florida*, 47 U.S. 811, 816-17 (1985); *Johnson v. Massey*, 1993 WL 372263, *4 (D. Conn. 1993) (noting that under controlling Supreme Court precedents, plaintiff could not claim a reasonable expectation of privacy in her fingerprints so as to give rise to a Fourth Amendment claim).

That said, plaintiffs must still show that the search is unreasonable. U.S. Const. amend IV; *Skinner*, 489 U.S. at 619 (noting that the Fourth Amendment does not proscribse all searches, only those that are unreasonable). Generally speaking, the reasonableness of a search is judged by balancing the search's intrusion on an individual's Fourth Amendment rights against the government's interest in pursuing the search. *Id.* In most criminal cases, this balance is struck in favor of the individual. Thus, a search is typically considered unreasonable unless conducted pursuant to a warrant supported by probable cause. *Id.*

Nevertheless, neither a warrant, probable cause or indeed, any measure of individualized suspicion, are considered indispensable components. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989). And in certain circumstances, the Supreme Court has not hesitated to dispense with these requirements, balance the various interests at stake, and find suspicionless searches to be reasonable. The difficulty, however, is in deciding when to engage in case-by-case balancing.

In dealing with DNA statutes similar to New York's, some courts have balanced only after applying the "special needs" test. *See Goord*, 2003 WL 256774 at * 7 (collecting cases). [FN5] Others, however, simply balanced without engaging the special needs cases. *Id.* (collecting cases). In either case, nearly all courts have held DNA searches to be reasonable under the Fourth Amendment. [FN6]

FN5. First articulated by Justice Blackmun in his concurrence in *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985), this test provides that only in those

> circumstances where some special need beyond the normal need for law enforcement makes the warrant and probable cause requirements impracticable should courts engage in balancing.
>
> FN6. The only courts to hold such statutes unconstitutional are the Eastern District of California in *United States v. Miles*, 228 F. Supp. 2d 1130 (E.D. Cal. 2002) and the Ninth Circuit in *United States v. Kincade*, 2003 WL 22251374 (9th Cir. 2002). The Ninth Circuit, however, has recently vacated its opinion in *Kincade* pending a rehearing en banc. 354 F.3d 1000 (9th Cir. 2003).

Here, the Magistrate Judge applied the special needs test even going so far as to hold that *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) and *Ferguson v. City of Charleston*, 532 U.S. 67 (2001)--two of the Supreme Court's latest special needs cases--requires it. Said the Magistrate Judge: "*Edmond* and *Ferguson* may be read to require that DNA indexing statutes must be analyzed solely in accordance with the 'special needs' doctrine." *Goord*, 2003 WL 256774 at *11. Thus, "apart from cases involving some level of individualized suspicion" there is "no room for a classic Fourth Amendment 'balancing analysis.' " *Id.* I disagree.

[3] It is dubious logic to suggest that by applying the special needs test to the particular searches in *Edmond* and *Ferguson*, the Supreme Court implied that it should be used to analyze all searches. This is particularly true where, as here, we are dealing with convicted felons currently serving out their terms. At best *Edmond* and *Ferguson* can be read to suggest that with respect to collecting DNA samples from the general population, one might have to show some special need. As to prisoners who have little expectation of privacy, however, there is no reason why such a showing is required. *See Green v. Berge*, 354 F.3d 675, 680-81 (7th Cir. 2004) (Easterbrook concurring) (criticizing the *Kincade* court for applying the special needs analysis to analyze the DNA collection of persons on supervised release).

Indeed, the Supreme Court has previously applied a simple balancing test when it comes to searches of inmates. In *Bell v. Wolfish*, 441 U.S. 520, 560 (1979), for example, the court used a balancing test to conclude that visual body cavity inspections of inmates undertaken on less then probable cause were reasonable. And most recently, in *United States v. Knights*, 534 U.S. 112, 118 (2001), the court used a balancing, or "totality of the circumstances" test to uphold a warrantless search of a probationer's home. As the *Knights* court noted, the "touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* at 118-119, *citing*, *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999).

Of particular significance here is that the *Knights* court rejected defendant's argument that only those searches serving some special need, i.e., a probationary purpose, are permissible. *Knights*, 534 U.S. at 120-21. This is because when it comes to probationers a state has a dual concern. "On the one hand is the hope that he will successfully complete probation and be integrated back into the community. On the other is the concern, quite justified, that he will be more likely to engage in criminal conduct than an ordinary member of the community." *Id.* at 121. Limiting searches solely to those serving a probationary purpose, however, would "require the State to shut its eyes to the latter concern ..." *Id.* at 122. The Fourth Amendment does not require such a choice. Thus, the state's interest in apprehending violators of the criminal law justifies focusing on probationers in a way not allowed for ordinary citizens. *Id.* at 121. [FN7]

> FN7. In light of *Knights*, I decline to follow *Roe v. Marcotte*, 193 F.3d 72, 79 (2d Cir. 1999) wherein this circuit used the special needs test to analyze Connecticut's DNA indexing statute.

When viewed on a continuum, persons on conditional release (such as the defendant in *Knights*) have fewer liberties then those

who either have already served their entire term or have never been convicted of a felony. Prisoners have even fewer liberties. It follows, then, that if the *Knights* court was willing to forgo the special needs analysis and just apply a balancing test for a person on probation, surely such an approach is also preferable with regard to felons still serving prison terms. To analyze this case as a special needs case would run contrary to *Knights* and obfuscate the analysis as it applies to ordinary citizens versus inmates.

[4] Not only is such an approach permissible, it is also better reasoned. The purpose of New York's law is to "create a DNA database to assist in solving crimes should the investigation of such crimes permit resort to DNA testing of evidence." *Goord*, 2003 WL 256774 at *12. The law itself makes this clear: providing that samples should be analyzed only "for the markers having value for law enforcement identification purposes." N.Y. Exec. Law 995(c)(5)(2003).

As *Ferguson* and *Edmond* hold, such an objective cannot be considered a special need. In *Ferguson*, the court struck down a hospital drug-testing program that authorized staff to test urine samples of pregnant women for drugs and turn over positive results to police. *Ferguson*, 532 U.S. at 71-72. Women who either refused drug treatment or subsequently tested positive a second time, risked arrest and prosecution. *Id.* at 72. Since the "immediate objective of the searches was to generate evidence for law enforcement purposes," the policy could not be said to further a special need. *Id.* at 83-84. Similarly, in *Edmond*, the court struck down a highway checkpoint program established to discover and interdict drugs. *Edmond*, 531 U.S. at 34. Like *Ferguson*, the *Edmond* Court held the program unconstitutional; characterizing its purpose as an effort to "detect evidence of ordinary criminal wrongdoing." *Id.* at 453.

The stated purpose behind the New York law is indistinguishable from the policies invalidated in *Ferguson* and *Edmond*. Here, as in *Ferguson* and *Edmond*, the New York law is aimed at generating evidence to aid in criminal investigations and prosecutions. Matched with DNA collected at a crime scene, indexed

samples can provide powerful proof of a person's guilt. Far from being divorced from the State's general interest in law enforcement, collecting DNA is part and parcel of it . [FN8]

> FN8. This is also in accord with earlier special needs cases. As the *Ferguson* court indicated, in "none of our previous special needs cases have we upheld the collection of evidence for criminal law enforcement purposes." *Ferguson*, 532 U.S. at 84, fn. 20; *see Skinner*, 489 U.S. at 621 (upholding drug tests designed "not to assist in the prosecution of employees, but rather to prevent accidents and casualties in railroad operations."); *Von Raab*, 489 U.S. at 665 ("Customs Service's drug testing program [ ] not designed to serve the ordinary needs of law enforcement" as "[t]est results may not be used in a criminal prosecution ... without [ ] consent").

In an effort to make DNA indexing appear more administrative, the Magistrate Judge seems to focus on the nature of DNA as "evidence" of criminal wrongdoing. He notes, for example, that DNA samples alone are not evidence that the donor committed a crime. 2003 WL 256774, *13. Further, he explains, that DNA is most useful for aiding future criminal investigations. 2003 WL 256774, *13. Whether such evidence in itself or in conjunction with other evidence, provides proof of criminal wrongdoing is not relevant. Purpose, not the "type" of evidence collected, is the ultimate touchstone of special needs analysis and to separate the collection of DNA from the statute's purpose, would be illogical. *See Miles*, 228 F. Supp. 2d at 1138, fn. 6 (2003) ("it is intellectually dishonest to decouple the collection of information ... from the law enforcement purpose for which the database was created"). [FN9]

> FN9. To be sure, the distinctions the Magistrate Judge alludes to provide reasons as to why taking blood and indexing it for DNA may otherwise be a reasonable search. Indeed, the programmatic

> features of the statute ameliorate some of the concerns associated with a typical Fourth Amendment search. In this sense, then, the means used may be special. The purpose, however, is most certainly not.

Finding that this case should be analyzed using a simple balancing test, however, does not end the inquiry. Attention must turn to whether the search is reasonable. As noted, the test of reasonableness requires a balancing of the individual's Fourth Amendment interest against the government's interest in conducting the search. Although the test is incapable of precise definition or application, some of the factors to consider are: the strength of plaintiff's privacy interest; the nature and scope of the intrusion; and the government interest at stake.

[5] Plaintiff's interest in their DNA is minimal. As noted earlier, typing for DNA is similar to fingerprinting. In both cases, the information derived is substantially the same, i.e., an identifying marker unique to that individual. Fingerprinting, in turn, has been universally accepted as a routine practice. *Jones*, 962 F.2d at 305; *see also Smith v. United States*, 324 F.2d 8179, 882 (D.C. Cir. 1963) ("it is elementary that a person in lawful custody may be required to submit to photographing and fingerprinting as part of routine identification processes") (internal citations omitted). This is not surprising when one considers that the state has a legitimate interest in the identity of those in lawful custody. *See Rise v. Oregon*, 59 F.3d 1556, 1560 (9th Cir. 1995); *Jones v. Murray*, 962 F.2d 303, 306-07 (4th Cir. 1992) (noting that "when a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest"). In light of this, plaintiffs can hardly claim to have a significantly greater interest in their DNA.

Further, the scope of the intrusion is minimal. As to fingerprinting, the Supreme Court has noted that it "involves none of the probing into an individual's private life and thoughts that marks an interrogation for speech." *Davis*, 394 U.S. at 727. Similarly, typing for DNA reveals limited amounts of information. In fact, New

York's DNA law requires that analysis be done solely on those markers that have identification purposes. Thus, typing DNA provides "no information of any apparent utility to law enforcement other then identification; nor is any additional usage permitted by the statute." *Goord*, 2003 WL 256774 at *16.

Neither does the fact that the gathering of DNA may require drawing blood alter the analysis. Inmates are already required to undergo physical examinations, including blood tests, so that prisons can attend to their medical requirements. The Supreme Court, moreover, has long characterized drawing blood as minimally intrusive considering that such tests "are a commonplace ... experience with them teaches that the quantity of blood extracted is minimal ... and [it] involves virtually no risk, trauma, or pain." *Skinner*, 489 U.S. at 625 (internal citations omitted).

Moreover, the purpose of the warrant requirement is to protect against "random or arbitrary" acts of government agents. *Id.* at 622. However, the fact that the statute is universally applied and DNA is not gathered with respect to particular investigations alleviates these concerns. Thus, by "ensuring that blood extractions will not be ordered randomly or for illegitimate purposes" New York's statute "fulfills a principle purpose of the warrant requirement." *Rise*, 59 F.3d at 1562.

Finally, compared to the nature and the invasion of privacy, there is a significant governmental interest. That interest is in having information readily available to aid criminal investigations. As explained, DNA can be used as a powerful tool in solving both past and future crimes. Given the rate of recidivism amongst felons (particularly violent felons), the state certainly has a significant interest in maintaining a DNA database that sufficiently outweighs whatever intrusion of privacy there is such that the taking blood and analyzing it for DNA constitutes a reasonable search.

CONCLUSION

[6] For the above reasons, defendants' motion to dismiss is

granted. The clerk is ordered to close the case.

SO ORDERED.